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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 282

HELEN C. JOHNSON, HERBERT F. JOHNSON, JR., HENRIETTA J. LOUIS, ET AL., ETC., APPELLANTS,

vs.

ARTHUR STAR

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

FILED AUGUST 4, 1932

(36,979)

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defendant, or that he has in his hands effects belonging to defendant.

Plaintiff prays for a writ of garnishment against the said Arthur Star, Dallas, Texas, and for other proceedings thereon, as in like cases are provided by law. Affiant further says that he is agent for plaintiffs and is authorized to make this affidavit.

O. H. Woodrow, Agent for Plaintiffs.

Sworn to and subscribed before me this the 9th day of April, A. D. 1930. Thurmon Wisely, Notary Public in and for Grayson Co. Texas. (L. S.).

[File endorsement omitted.]

[fol. 3] IN JUSTICE COURT OF GRAYSON COUNTY

No. 10954

HELEN C. JOHNSON et al.

vs.

ARTHUR STAR, Garnishee

GARNISHEE'S ANSWER—Filed April 22, 1931

To the Honorable J. N. Phillips, Justice of the Peace:

Now comes Arthur Star, garnishee in the above entitled and numbered cause, in response to the writ of garnishment heretofore served upon him herein, and, being first sworn, without waiving his plea of privilege and motion for costs heretofore filed herein but expressly subject thereto, on this the first day of the term of said court next ensuing the [fol. 4] service of such writ, makes answer as follows:

I

Said garnishee excepts generally to the writ of garnishment heretofore served upon him herein, and the application and affidavit therefor, and says that same are each insufficient in law, and of this he prays judgment of the court, discharging him without day with his costs, including a reasonable attorney's fee as herein prayed.

II

Without waiving said exception, but subject thereto, defendant answers further:

1. That he individually is not indebted to Dallas Showcase Manufacturing Company, Inc., nor was he at the time of service of such writ upon him.

2. That he has not now, nor had he at the time of service of such writ upon him, effects in his individual possession belonging to Dallas Showcase Manufacturing Company, Inc.

3. That he does not individually know of any person or persons who are indebted to said Dallas Showcase Manufacturing Company, Inc.

III

For further answer herein, if such be necessary, garnishee Arthur Star answers specially as follows: On the 13th day of March, 1931, Dallas Show Case & Maufacturing Company, a corporation, acting by its duly authorized president, Richard F. Coerver, executed and delivered to Arthur Star a deed of assignment for the benefit of creditors, and acting under the authority thereby conferred and pursuant thereto said Arthur Star, garnishee herein, took possession of all the assets and property of said corporation and proceeded to convert same into cash. That he now has in his hands the sum of $582.63 in cash, which sum he had [fol. 5] at the time of the service of the writ of garnishment upon him, realized from the sale and disposal of said assets of Dallas Show Case & Manufacturing Company, but that he has not now, nor had he at the time of the service of said writ upon him, any effects in his hands belonging to or derived from said Dallas Show Case & Manufacturing Company. Your garnishee specially denies that the said sum of $582.63 belongs to Dallas Show Case & Manufacturing Company, or is due or owing to said company, or that said company has any interest of any sort therein, but your garnishee alleges and contends that said sum of $582.63 held by him belongs to him as assignee for the benefit of creditors, and is held by him in trust for said creditors, and said Dallas Show Case & Manufacturing Company has no interest therein, and that said fund is not subject to garnishment for claims against the said Dallas Show Case & Manufacturing Company.

IV

This garnishee further shows the court that he has employed Wm. Andress, Jr., an attorney, to represent him in this suit and frame and file his answer herein and has contracted with such attorney to pay him a fee of $25.00 which is a reasonable and usual fee for such service, and that he has further incurred the additional expense of $5.00 for transportation and other expenses in attendance of his said attorney on this court, which he says are reasonable and necessary expenses.

Wherefore, premises considered, garnishee prays that he be discharged herein without day, with his costs and such reasonable compensation of $30.00 as prayed for.

Arthur Star.

Subscribed and sworn to before me this 21st day of [fol. 6] April, 1931. W. T. Andress, Notary Public, Dallas County, Texas. (L. S.)

[File endorsement omitted.]

In Justice Court of Grayson County

Docket Entries

No. 10954

Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis, and John J. Louis, Plaintiffs,

vs.

Arthur Star, Dallas, Texas, Garnishee; Dallas Showcase Mfg. Co., Inc., Defendant

Justice's Costs:

Docketing	.10
Bond	.50
Taxing cost	.10
Garnishment	.50
Order in the case	.25
Judgment Final	.50
Taking Appeal Bond	.25
Transcript of Docket	1.50
Filing 5 papers	.25
Controverting Affvt.	.50
Garnishee's Atty. Fee	25.00

Constable's Costs:

Citation	1.00
Cont. Affvt.	1.00
Total	$31.45

Suit upon balance judg. #10331 for $122.90 of date ——, ——. Due: —— —, ——. Interest: ——. Filed 9th day of April, 1931, citation issued the 9th day April, 1931, returnable to April Term, 1931, and placed in the hands of Constable at Dallas, Texas, returned duly executed 10th day of April, 1931. 4-22-31. Defendant's plea of privilege filed.

4-22-31, Garnishee's answer filed.

(Signed) J. N. Phillips, J. P.

4-22-31, Garnishee's answer filed.

(Signed) J. N. Phillips, J. P.

[fol. 7] 4-22-31, Garnishee's motion for costs file- and plaintiff files cost bond.

(Signed) J. N. Phillips, J. P.

4-22-31, Plaintiff's controverting affidavit filed.

(Signed) J. N. Phillips, J. P.

4-23-31, Controverting affidavit returned duly served upon garnishee.

(Signed) J. N. Phillips, J. P.

5-19-31, Upon hearing the defendant's plea of privilege overruled.

(Signed) J. N. Phillips, J. P.

JUDGMENT

On this the 19th day of May, 1931, came on to be heard the above entitled and numbered cause. Came the plaintiffs by their attorney and the garnishee by his attorney and announced ready for trial and the garnishee filed answer herein as required by law. And it appearing to the Court from such answer that the garnishee, Arthur Star, as assignee is indebted to the defendant, Dallas Show Case

& Manufacturing Company, a corporation in the sum of $582.63; and further that in case of Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and John J. Louis trading as S. C. Johnson & Son, plaintiffs, vs. Dallas Show Case & Manufacturing Co., a corporation defendant, cause #10331 in this court, the plaintiffs on the 25th day of August, 1930, recovered a judgment against the defendant in the sum of $113.20 together with interest at 6% thereon from August 25, 1930, and $27.70 costs, there having been collected the sum of $42.35 to apply as a credit against said judgment and the balance of said judgment is still unsatisfied. It is, therefore, ordered, adjudged and decreed that the plaintiffs, Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and John J. Louis do have and recover of and from the garnishee, Arthur Star, the sum [fol. 8] of $103.08 which amount does not exceed plaintiff's judgment against the defendant, Dallas Show Case & Manufacturing Co., a corporation with interest thereon and all costs, including those in this proceeding, for which let execution issue; and it is further ordered, adjudged and decreed that the collection of any such indebtedness due by the said garnishee to the said defendant under this judgment shall be a bar to any recovery from said garnishee of such part of such indebtedness by the said defendant or by any of the creditors of the said defendant the Dallas Show Case & Mfg. Co., a corporation; and it is further ordered, adjudged and decreed that there be taxed as costs in behalf of the said garnishee as his reasonable compensation herein the sum of $25.00 which shall be included in such execution and paid by the officer collecting same to such garnishee.

(Signed) J. N. Phillips, Justice of the Peace, Pct. 1, Grayson County, Texas.

May 19, 1931, the Garnishee in open Court excepts to the judgment of the Court and gives notice of appeal to the County Court of Grayson County, Texas.

(Signed) J. N. Phillips, J. P.

5-22-31, Appeal Bond in the sum of $230.00 executed by Arthur Star as Principal and W. T. Andress and J. I. Shor as sureties filed and approved.

(Signed) J. N. Phillips, J. P.

THE STATE OF TEXAS,
County of Grayson:

I, J. N. Phillips, Justice of the Peace do hereby certify that the above and foregoing is a true and correct transcript of the entries on my docket on page — in the cause of Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and John J. Louis, versus Arthur Star, Garnishee, Dallas Showcase Mfg. Co., Defendant.

[fol. 9] Witness my hand this the 22nd day of May, 1931.

J. N. Phillips, Justice of the Peace, Precinct No. One.

[File endorsement omitted.]

Bond on appeal for $230.00, approved and filed May 22, 1931, omitted in printing.

[fol. 10] IN COUNTY COURT OF GRAYSON COUNTY

No. 11851

HELEN C. JOHNSON et al.

vs.

ARTHUR STAR, Garnishee; DALLAS SHOWCASE AND MFG. CO.

AGREED STATEMENT OF FACTS—Filed June 4, 1931

The parties to the above entitled and numbered cause agree that the following is a statement of facts upon which judgment shall be rendered herein, the controversy herein being submitted to the court upon same as such agreed statement of facts:

On the 25th day of August, 1930, plaintiffs recovered a judgment against the defendant, Dallas Showcase & Manufacturing Company, a corporation, in the sum of $113.20, together with interest at 6% thereon from date of judgment, and for costs, these costs amounting to $27.70. This judgment is subject to and has received a credit for the sum of $42.35 collected thereon.

On March 13th, 1931, the defendant, Dallas Showcase and Manufacturing Company, a corporation, while insolvent, acting by and through its duly authorized president, executed to Arthur Star, the garnishee herein, a deed of [fol. 11] assignment for the benefit of its creditors. In compliance with the statutes and acting under the authority therein conferred and pursuant thereto, said Arthur Star, garnishee herein, as such assignee, took possession of all the assets and property of the said corporation and proceeded to convert same into cash.

On the 9th day of April, 1931, the plaintiffs herein duly sued out of the Justice Court Precinct No. 1 Grayson County, Texas, a writ of garnishment in cause 10954, and caused same to be served upon Arthur Star; such writ of garnishment being sued out of the Justice Court in which the original judgment against the defendant was obtained.

The garnishee, in due time, filed a formal plea of privilege seeking to transfer the cause to the Justice Court, Precinct No. 1, Dallas County, Texas, where he resided, to which plea of privilege plaintiffs answered by controverting affidavit, and after due and legal service, upon hearing, the plea of privilege was overruled. The garnishee herein hereby expressly waives the plea of privilege and no issue as to the venue is before this court.

The garnishee, in due time, filed a formal answer in the Justice Court which answer is admitted in evidence and constitutes a part of this record as does the transcript of the Justice Court docket. This answer was not controverted and the allegations of fact therein are admitted as true.

On the 19th day of May, 1931, the Justice of the Peace, upon hearing, rendered judgment against the garnishee in the sum of $103.08; together with all costs of suit, and provided that $25.00 be taxed in the costs as attorney's [fol. 12] fees for the garnishee, to which judgment the garnishee duly excepted and gave notice of appeal to this honorable court.

On the 22nd day of May, 1931, the garnishee duly filed and the Justice of the Peace duly approved an appeal bond executed by Arthur Star as principal and W. T. Andress and J. I. Shor as sureties in the sum of $230.00.

Upon the foregoing facts, together with garnishee's original answer and a transcript of the Justice Court record, this case is submitted to this court for judgment.

Witness our hands by our attorneys of record, this the — day of May, A. D. 1931.

Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis, and John J. Louis, Plaintiffs, by C. Huggins, Attorney. Arthur Star, Garnishee, by Wm. Andress, Jr., Attorney.

[File endorsement omitted.]

In County Court of Grayson County

No. 11851

Helen C. Johnson et al.

vs.

Arthur Star, Garnishee

Judgment

This the 30" day of May, 1931, in the above entitled and numbered cause wherein Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and John J. Louis are plaintiffs and Arthur Star, Garnishee, is defendant, came the parties by their attorneys and announced ready for [fol. 13] trial and submitted the matters in controversy upon an agreed statement of facts to the court without the intervention of a jury, and the pleadings, the evidence and the argument of counsel having been heard and fully understood, it is the opinion of the court that the plaintiffs should have and it is accordingly ordered, adjudged and decreed that plaintiffs do have and recover of and from the said defendant the sum of $103.08, with interest thereon at the rate of 6% per annum from May 19th, 1931, and their costs in this behalf expended, and that they have their execution. It is the further order of this court that the sum of $30.00 shall be taxed as costs to cover garnishee's attorney's fees.

To all of which the defendant, Arthur Star, by his attorney, duly excepted and in open court gave notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

A. S. Noble, County Judge.

[fol. 14] IN COUNTY COURT OF GRAYSON COUNTY

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 4, 1931

In response to the request of defendant, in the above entitled and numbered cause, I find, make and file the following as my findings of fact and conclusions of law therein:

[fol. 15] Findings of Fact

1. Plaintiffs are the owners and holders of a valid and subsisting judgment rendered on August 25, 1930, against the Dallas Showcase and Manufacturing Company, a corporation, the unpaid balance of which is $103.08, with interest at 6% per annum from May 19, 1931.

2. On March 13, 1931, Dallas Showcase and Manufacturing Company, a corporation, by its properly authorized president, while insolvent, executed a deed and assignment of all its property to Arthur Star for the benefit of its creditors, share and share alike, which deed and assignment is in compliance with Title 12 of the 1925 Revised Civil Statutes of Texas, pertaining to assignments for the benefit of creditors. Acting under the authority of such deed defendant, Arthur Star, as such assignee, took possession of all such assets and property of the Dallas Showcase and Manufacturing Company and proceeded to convert same into cash. The amount of unsecured indebtedness of the Dallas Showcase and Manufacturing Company at the time of such deed and assignment was approximately $11,000.00. Plaintiffs did not *accept* under such assignment.

3. On April 9, 1931, the plaintiffs sued out a writ of garnishment, based upon said judgment, in the court having jurisdiction thereof, against Arthur Star. At the time of service of such writ upon defendant the defendant personally was not indebted to Dallas Showcase and Manufacturing Company nor had he assets of said company in his hands, but defendant held in his hands as assignee for the benefit of creditors, the sum of $582.63, all of which

facts were set up by defendant in a formal answer in garnishment properly filed in due time and uncontroverted.

Conclusions of Law

1. The deed and assignment to Arthur Star, executed by the Dallas Showcase and Manufacturing Company as above set forth, would have been sufficient to pass title to all of [fol. 16] its assets to said Arthur Star, for the benefit of its creditors, if Title 12 of the 1925 Revised Civil Statutes of Texas was valid.

2. Title 12 of the 1925 Revised Civil Statutes of Texas is invalid because it is in conflict with the United States Bankruptcy law.

3. Such title 12 being invalid, title to the assets of Dallas Showcase and Manufacturing Company did not pass to Arthur Star and he held such assets as agent of Dallas Showcase and Manufacturing Company.

4. The fund of $582.63 so held by defendant Arthur Star as agent of Dallas Showcase and Manufacturing Company, was subject to garnishment by plaintiffs as judgment creditors of Dallas Showcase and Manufacturing Company.

A. S. Noble, Judge of the County Court of Grayson County, Texas.

[File endorsement omitted.]

In County Court of Grayson County

[Title omitted]

Assignments of Error—Filed June 6, 1931

Arthur Star, Garnishee, in the above entitled and numbered cause assigns the following as the errors committed by the court in the trial of such cause on the 30th day of May, 1931, to-wit:

First Assignment of Error

The Court erred in rendering judgment against the defendant Arthur Star, Garnishee, and in holding Title 12

of the Revised Civil Statutes of Texas invalid on the grounds that it conflicts with and contravenes the United [fols. 17 & 18] States Bankruptcy Law of 1898 as amended.

Second Assignment of Error

The court erred in holding the title to the assets of Dallas Show Case & Manufacturing Company did not pass to the defendant, Arthur Star, under the deed and assignment executed by said company to the defendant, Arthur Star, on March 13, 1931.

Third Assignment of Error

The court erred in holding that the assets of Dallas Show Case & Manufacturing Company held by the defendant, Arthur Star, were held by him as agent of such company and not in trust as assignee for the benefit of creditors.

Fourth Assignment of Error

The court erred in holding that the fund of $582.63 in the possession of the defendant, Arthur Star, representing the assets of Dallas Show Case & Manufacturing Company when converted into cash, was subject to garnishment by the plaintiffs as judgment creditors of said Dallas Show Case Manufacturing Company.

Wm. Andress, Jr., Attorney for Defendant.

[File endorsement omitted.]

Supersedeas bond on appeal for $500.00, approved and filed June 6, 1931, omitted in printing.

[fols. 19 & 20] Cost bill omitted in printing.

[fol. 21] IN COURT OF CIVIL APPEALS OF TEXAS

No. 11087

ARTHUR STAR, Appellant,

vs.

HELEN C. JOHNSON et al., Appellees

From the County Court of Grayson County

OPINION—Filed Nov. 3, 1931

The question for decision is whether the "Assignment for Creditors" Act, Title 12 R. S. 1925, was suspended by the National Bankruptcy Law, and it arose as follows: appellees, judgment creditors of the Dallas Show Case & Mfg. Company, a corporation, caused a writ of garnishment to be served on Arthur Star, its assignee, under a general assignment for the benefit of creditors. The garnishee answered, denying that he was personally amenable to the writ, but alleged that on March 13, 1931, the Dallas Shoe Case & Mfg. Company, assigned to him all its assets for the benefit of creditors, that he took possession of said assets, converted same into cash, to-wit: the sum of $582.63, which was in his possession at the time the writ was served. He denied that the judgment debtor owned this money, but that same belonged to him, as assignee for the benefit of creditors, and was being held by him in trust for such purpose, hence the fund was not subject to garnishment at the suit of appellees. He therefore prayed for discharge with an allowance of $30 for costs and attorney's fee. Judgment went against appellant in the Justice Court on his answer; the case was appealed to the County Court, and submitted on an agreed statement, which included the salient facts set out above, the transcript of the Justice Court record, and the answer of garnishee, which was not contested.

The court concluded, as a matter of law, that the "Assignment for Creditors" Act was suspended by the National Bankruptcy Law, that title to the assets of the corporation [fol. 22] did not pass to appellant by the assignment, hence the proceeds thereof were held by him as agent for assignor, and were garnishable at the suit of appellees. The questions discussed are properly presented for consideration.

We think the construction given the "Assignment for Creditors" Act, in its relation to the Bankruptcy Law of Congress, by our Supreme Court in Patty-Joiner vs. Cummins, 93 Tex. 598, 57 S. W. 566, announced the doctrine that is decisive of this controversy. The court, answering certified questions, held that the provision of the assignment statute requiring the creditor to release any part of his claim was suspended by the bankrupt act, but as the assignment under consideration conveyed the debtor's property for the equal benefit of all accepting creditors, it was otherwise valid, except as against bankruptcy proceedings taken within four months. The court also held, that the assignee was not subject to garnishment at the suit of a non-consenting creditor.

In the case of Haijek v. Luck, 96 Tex. 517, 519, 74 S. W. 305, the Supreme Court had occasion to restate its holding in the Petty-Joiner-Cummins case, as follows: "The case of Patty, Joiner & Eubank Company v. Cummins, 93 Texas, 598, referred to in the certificate, determines two questions: First, that an assignment made under the assignment law of this State which does not exact releases, though subject to be set aside by proceedings in bankruptcy seasonably instituted, was not otherwise void; and second, that even such an assignment which is made for the benefit of such creditors only as should accept under it and release the assignor from further liability operated a transfer of the property, and that it was not subject in the hands of the assignee to a writ of garnishment by a non accepting creditor * * *".

[fol. 23] In the Patty-Joiner-Cummins case, the Supreme Court cited Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377, and Boese v. King, 108 U. S., 379, 27 L. Ed. 760, 2d Sup. Ct. Rep. 765. In the Mayer-Hellman case, the court held, opinion by Judge Field, that an assignment by an insolvent debtor of his property to trustees for the equal and common benefit of all his creditors was not fraudulent, and, when executed six months before proceedings in bankruptcy taken against the debtor (under the Act of 1867) was not assailable by the assignee in bankruptcy subsequently appointed. In Boese v. King, the court held, opinion by Judge Harlan, that, under the Bankruptcy Act of 1867, an assignment of one's property, to be equally distributed among his creditors under

a state statute, was an act of bankruptcy for which, under proper proceedings, he could be adjudged a bankrupt, and the property rested from his assignees for administration in the bankruptcy court, but except as against such proceedings, an assignment for the benefit of creditors without intent to hinder delay or defraud creditors, was valid, at least for the purpose of securing an equal distribution of the estate among creditors, and that the assignees could hold the proceeds of such property, deposited by them in another State, against a receiver of the debtor's property appointed in that State. Judge Holmes, in Randolph v. Scruggs, 190 U. S. 533, 537, 41 L. Ed. 1170, said: "The assignment was not illegal. It was permitted by the law of the State, and cannot be taken to have been prohibited by the bankruptcy law absolutely in every event, whether proceedings were instituted or not. Re Sievers, 91 Fed. 366; Re Romanow, 92 Fed. 510. It has not general fraudulent intent. It was voidable only in case bankruptcy proceedings should be begun. At the time when it was made the [fol. 24] institution of such proceedings was uncertain. It seems to us that it would be a hard and subtle construction to say, as seems to have been thought in Bartlett v. Bramhall, 3 Gray, 257, 260, that when they were instituted they not only avoid the assignment, but made it illegal by relation bank to its date, when, if they had not been started, it would have remained perfectly good. The same doctrine was announced in Stallwagen v. Clum, 245 U. S. 612, 615, 62 L. Ed. 507, 511."

The opinions of these great judges who spoke for the Supreme Court in the cases just mentioned, wherein they held that state laws, in all material respects the same as ours, were not suspended by the National Bankruptcy Act, ought to be considered ample federal authority for the holding of our Supreme Court in the Patty-Joiner-Cummins case.

The soundness of the rule announced by our Supreme Court, in the Patty-Joiner-Cummins case, remained unchallenged until the Texarkana Court held differently, in Johnson v. Chapman Milling Co., 37 S. W. (2d) 776. The facts involved in the Johnson-Chapman case are analogous to the facts in the Patty-Joiner-Cummins case, as well as to the facts involved in the case at bar, in other words, the

facts of each of these cases invoke the same rule of decision. The Texarkana Court based its decision on International Shoe Co. v. Pinkus, 278 U. S. 261, 49 Sup. Ct. Rep. 108, 73 L. Ed. 318, as controlling authority.

While we have the highest respect for the opinions of the able and experienced judges who compose the Texarkana Court, we are constrained, after careful consideration, to the view that their decision is incorrect. The Pinkus case announced no new rule of law; on the contrary, it is entirely consistent with the line of decisions to which it properly [fol. 25] belongs. The court was there dealing with a case that arose under a statute of Arkansas, held at the outset to be an insolvency law. The court said: "The Arkansas statute is an insolvency law. It is so designated in its title (Acts of Arkansas 1897) and in the revision. The Supreme Court of the state treats it as such". In the course of the discussion, the court distinguished the case from Boese v. King, one of the cases cited as an authority by our Supreme Court in Patty-Joiner-Cummins, and on this phase said: "His (Pinkus) purpose was to delay plaintiff in error and to secure full release as provided by the statute. The State Court did not treat the proceedings under the State law as a transfer of insolvent's property for unconditional distribution as was done in Boese v. King. On the contrary the decree was the same as if the Bankruptcy Act had not been passed, and the (State) court held that, "without giving any effect to the statute, the insolvent, by what was done in the chancery court, could compel the same distribution and obtain for himself the same advantages as were contemplated by the insolvency law. We are of opinion that the proceedings in the chancery court cannot be given that effect. The enforcement of State insolvency systems, whether held to be in pursuance of statutory provisions or otherwise, would necessarily conflict with the National purpose to have uniform laws on the subject of bankruptcies throughout the United States."

That the "Assignment for Creditors" Act of this State is not an insolvency law, was held by our Supreme Court in Keating v. Vaughn, 61 Tex. 518, 524, in an opinion by Judge Stayton, who said: "The statute in question is in no sense an insolvent law, providing for the discharge of a debtor

by a compliance with its terms without the consent of the creditor; but is a statute which, for the better protection [fol. 26] of creditors, prescribes a mode for the administration of the estates of insolvents under assignments made by the debtors themselves, which would be good at common law, unaided by the statute, and like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration."

It is very evident that, there are two distinct lines of decisions—one involving cases arising under general insolvent statutes, as in the Pinkus case, and the other involving cases arising under statutes permitting general assignments for the benefit of creditors, as in Meyer v. Hellman, Boese v. King, Randolph v. Scruggs, and Stellwagen v. Blum, supra. These cases are easily distinguished, as was shown In re Sievers, 91 Fed., 368, in the following language:

"Concerning these different contentions, it appears to me that there is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent as a proceeding in the courts, derives its potency from the law, winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy, and such is undoubtedly superseded by the act of Congress in question * * *. The other derives its potency, not from the law, but from the contract or deed of the debtor, is administered under and according to the provisions of the deed, supplemented only by salutary legislative safeguards, and does not result in the discharge of a debtor from his obligations. This method of proceeding is not superseded by the act of Congress in question. Mayer v. Hellman, 91 U. S. 496; Boese v. King, 108 U. S. 379, Sup*t*. Ct. 765; Reed v. McIntyre, 98 U. S. 507."

[fol. 27] Again the Supreme Court, in Straton v. New, 51 Sup. Ct. Rep. 465, 469, recognizing the two lines of decisions cited and classified the Pinkus case as belonging to the group based upon State insolvency statutes, in effect,

bankruptcy proceedings, that were suspended by the National Bankrupt Act, and all proceedings thereunder held void, the court said:

"The appellees, however, insist that the purpose and function of the creditors' bill was a general disposition and distribution of the debtor's property; that it was a winding up proceeding pursuant to state law, and was therefore superseded by the bankruptcy. They invoke the settled rule that state insolvency laws which are tantamount to bankruptcy because they provide for an administration of the debtor's assets and a winding up of his affairs similar to that provided by the national act are suspended while the latter remains in force, and proceedings under them are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before. Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 S. Ct. 857, 46 L. Ed. 1113; Miller v. New Orleans Acid & Fertilizer Co., 211 U. S. 496, 29 S. Ct. 176, 53 L. Ed. 300; Stellwagen v. Clum, 245 U. S., 605; 38 S. Ct. 215, 62 L. Ed. 507; International Shoe Co. v. Pinkus, 278 U. S. 261, 49 S. Ct. 108, 173 L. Ed. 318. It was pointed out in Stellwagen v. Clum, supra, that state laws which provide for sale and distribution of a debtor's property may not amount to insolvency laws; and it was there held that such laws, if not inconsistent with the administration of the bankruptcy act, are available to litigants. Appellees must therefore show that the statutory action in the state court is, in fact, an insolvency proceeding."

In the light of these authorities, we are of opinion that, the Texas "Assignment for Creditors" Act was not sus- [fol. 28] pended by the National Bankrupt Law, except as to the provisions that provides for the discharge of claims of consenting creditors who are paid as much as one-third thereof, and the assignment under consideration being valid and enforcible in other respects, the trial court erred in holding to the contrary.

The assignment was not attacked for fraud in fact, nor was any evidence offered to that effect, but even if so, the statute provides that, fraud of parties thereto will not

affect the validity of an assignment made thereunder. See Art. 267 R. S. 1925, and Burnham v. Logan, 29 S. W. 1067. The most that could be said is that, the assignment was a potential fraud upon creditors of the Dallas Show Case & Mfg. Company, because made an act of bankruptcy. See clause (4) parag. (a) sec. 21 of Title 11 Bankruptcy U. S. C. A. pp. 173, 174. However, unless and until such an assignment is seasonably (within four months) attacked and an adjudication in bankruptcy is made, it will be considered and treated to all intents and purposes as valid and enforcible. Same authority note 81, p. 212.

We do not think the fund in the hands of appellant was garnishable at the suit of appellees. Our courts have repeatedly held that, a non-consenting creditor, in a general assignment for creditors, will not be permitted to defeat the purpose of the assignment by fixing liens, on the property assigned, under attachment process or otherwise, nor subject the same to sale for the payment of his claim; that property thus assigned is withdrawn from the reach of attachment or other processes at the suit of a non-consenting creditor. See Piggott v. Schram, 64 Tex. 447; Schoolher v. Hutchins, 66 Tex. 324, 1 S. W. 266; McKee v. Coffin, 66 Tex. 304, 1 S. W. 276; Burnham v. Logan, 88 Tex. 1-9, 29 S. W. 1067, 1070; Patty-Joiner v. Cummins, 93 Tex. 598, 57 S. W. 566.

[fol. 29] Article 271 of the assignment statute provides that, "Any creditor not consenting to the assignment may garnishee the assignee for any excess of such estate remaining in his hands after the payment to the consenting creditors the amount of their debts and the costs and expenses of executing the assignment." Appellees did not proceed under this statute, nor did they contest the answer of appellant; on the contrary, they admitted that the allegations of fact in the answer were true. The case was appealed without a statement of facts, but the court made and filed findings, to the effect, that the amount of the unsecured indebtedness of the judgment debtor at the time of the assignment, was approximately $11,000; that appellant, as assignee, took possession of all assets and properties of the assignor, converted same into cash, and when garnished had on hand for the benefit of creditors the sum of $582.63. In view of this situation, no presumption can be indulged that an excess will remain after the purposes of the assign-

ment are executed. We are of the opinion, therefore, that the judgment of the court below should be reversed and here rendered, that appellees take nothing against appellant, and that he have judgment against them for $30 attorney's fee and expenses incurred in answering the garnishment.

Reversed and rendered.

Looney, Associate Justice.

Delivered Oct. 31, 1931.

[File endorsement omitted.]

[fol. 30] In Court of Civil Appeals of Texas

11087

Arthur Star

vs.

Helen C. Johnson et al.

From County Court, Grayson County

Judgment—Oct. 31, 1931

Opinion of the Court delivered by Mr. Looney, Associate Justice:

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and judgment is now here rendered as follows: It is ordered, adjudged and decreed by the court that the appellees Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and Jno. J. Louis, trading as S. C. Johnson & Sons take nothing by their suit and that the appellant Arthur Star, Assignee of Dallas Showcase and Manufacturing Company go hence without day and have and recover of said appellees and O. H. Woodrow and Thurman Wisely, their sureties upon bond for writ of garnishment, thirty dollars attorney's fees and all costs in this behalf expended, and this decision be certified below for observance.

[fols. 31-41] Petition for rehearing, covering 11 pages, filed November 10, 1931, omitted from this print. It was denied and nothing more by order of November 28, 1931.

[fol. 42] In Court of Civil Appeals of Texas

[Title omitted]

Order Overruling Motion for Rehearing—November 28, 1931

This day came on to be heard the motion of appellees for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

[fol. 43] In Supreme Court of Texas

Helen C. Johnson et al., Plaintiffs in Error,

vs.

Arthur Star, Defendant in Error

Petition for Writ of Error—Filed Dec. 10, 1931

To the Honorable Supreme Court of Texas:

Your petitioners, Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and John J. Louis, respectfully represent that in the above styled cause on the 31st day of October, A. D. 1931, the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, reversed the judgment of the trial court and rendered judgment in favor of defendant in error, and thereafter in due time plaintiffs in error filed their motion for rehearing in said Court of Civil Appeals, praying that the said judgment of said court reversing and rendering said cause, be set aside and that the judgment of the trial court be affirmed, which motion for rehearing was thereafter, on the 28th day of November, A. D. 1931 by said court overruled and denied and said judgment thereupon became final.

Statement of the Case

Plaintiffs in error are judgment creditors of the Dallas Showcase and Manufacturing Company, having obtained judgment on August 25, 1930, on which there is an unpaid balance of $103.08.

On March 13, 1931, the Dallas Showcase and Manufacturing Company while insolvent executed a deed of assignment to Arthur Star, defendant in error.

[fol. 44] The assignment was purely a statutory one according to the agreed statement of facts which contains the following:

"In compliance with the statutes and acting under the authority therein conferred and pursuant thereto, said Arthur Star, garnishee herein, as such assignee, took possession of all of the assets and property of said corporation and proceeded to convert same into cash" (Tr. p. 10 & 14).

Plaintiffs in error did not accept under the assignment, but duly attacked its validity on April 19, 1931, by suing out a writ of garnishment based on their judgment, the suit originating in the Justice Court, and serving the writ upon Arthur Star, as assignee, who answered that he was not indebted to the Dallas Showcase and Manufacturing Company, nor had he assets of said company, but that he held in his hands as assignee for the benefit of creditors of the Dallas Showcase and Manufacturing Company the sum of $582.63, which he alleged was not subject to garnishment, and asked to be discharged with his costs and attorney's fees (Tr. p. 3-5).

The amount of unsecured indebtedness of the Dallas Showcase and Manufacturing Company at the time of the execution of the deed of Assignment was approximately $11,000.00.

The record is silent as to the amount of claims held by *accepting* creditors and it therefore does not appear herein and there is no means of determining by this record whether or not the accepting creditors will receive as much as, or more than, one-third of the amount of their respective claims. It is therefore not made to appear in the record whether the statutory discharge of the unpaid portion of the debts would become operative.

The record is further silent as to what disbursement of money was made by the assignee between the date of the making of the assignment and the service of the writ nor is it shown whether or not there was sufficient stockholder's [fol. 45] liability on unpaid stock subscription to create sufficient funds to pay a substantial portion of the indebtedness.

The judgment in the Justice Court was against the garnishee, the defendant in error herein, (Tr. p. 7), from which an appeal was taken to the County Court, in which court a judgment again was rendered against the garnishee, the defendant in error, (Tr. p. 11), the County Court concluding as a matter of law that Title 12 of Revised Civil Statutes 1925, "Assignment for creditors" act is invalid as applied to the facts involved in this case because it is in conflict with the United States Bankruptcy Law, and being invalid, such deed of assignment did not pass title to the assignee and the funds were subject to garnishment in suit by plaintiffs in error who were non-assenting creditors and who had filed their suit attacking the validity of the judgment within four months of the execution of the deed of assignment (Tr. p. 15), and who could not themselves without the co-operation of other creditors invoke the jurisdiction of the Bankrupt Court.

An appeal was duly perfected to the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, in which Court the judgment of the trial court was reversed and judgment rendered in favor of defendant in error, the Honorable Court of Civil Appeals holding that Title 12 Revised Civil Statutes 1925, "Assignment for Creditors" act, is valid and not in conflict with nor repugnant to the National Bankruptcy Act and being valid, the title to the assets duly passed to the assignee and protected the same from garnishment in suit timely filed by the plaintiffs in error as non-assenting creditors.

Grounds of Jurisdiction

This cause is one in which the jurisdiction of the court of Civil Appeals is not final under Title 37, Chapter 2, Article 1728, and Title 39, Chapter 1, Article 1921 of the Revised Civil Statutes of 1925 and amendments thereto, [fol. 46] this suit involving a conflict in the opinion of the

court below and a prior decision of another Court of Civil Appeals and also involving the validity of a statute of the State of Texas.

We submit that this court has jurisdiction over this cause for the following reasons:

(a) The Supreme Court has jurisdiction of this cause because the Court of Civil Appeals in this case holds differently from a prior decision of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas at Texarkana in the case of Johnson vs. Chapman Milling Co., 37 S. W. (2d) 776. In the case at bar the Court of Civil Appeals at Dallas held that Title 12, Revised Civil Statutes 1925, "Assignment for Creditors" act (Arts. 261-274) is valid, not being in conflict with nor repugnant to the National Bankruptcy Act and therefor- the deed of assignment protects funds in the hands of the assignee from garnishment in suit timely filed by non-assenting creditors. The Court of Civil Appeals at Texarkana held that such statute is invalid being in conflict with and repugnant to the National Bankruptcy Act and that such deed of assignment does not therefor- protect funds in the hands of assignee from garnishment in suit timely filed by non-assenting creditors.

(b) The Supreme Court has jurisdiction of this cause for the reason that this suit involves the validity of a statute of the State of Texas, to-wit, Title 12, Revised Civil Statutes 1925, "Assignment for Creditors" act, (Arts. 261-274) the trial court having held that such statute is invalid being in conflict with and repugnant to the National Bankruptcy Act and that the deed of assignment made under the provisions of such act did not therefore protect the funds in the hands of the assignee from garnishment in suit timely filed by non-assenting creditors. The Court of Civil Appeals reversed the judgment of the trial court and ren- [fol. 47] dered judgment in favor of defendant in error and in so doing stated at the outset of its decision that—"The question for decision is whether the 'Assignment for Creditors' act, Title 12, Revised Civil Statutes 1925, was suspended by the National Bankruptcy Law" and held in favor of the validity of such state statute and further held that the statute being valid, the proceedings under it pro-

tected the funds in the hands of the assignee from garnishment in suit timely filed by your petitioners who were non-assenting creditors.

First Assignment of Error

The court erred in reversing the judgment of the trial court and rendering judgment in favor of appellant and in thereby holding that Title 12, Texas Revised Statutes, 1925, "Assignment for Creditors" — (Arts. 261-274) is valid and that such state law does not conflict with and is not repugnant to Article 1, Section 8, cl. 4, of the Constitution of the United States.

First Proposition

The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount under the Federal Constitution and states may not pass or enforce laws to interfere with or complement the bankrupt- act or to provide additional or auxiliary regulations or which give insolvent debtors seeking discharge or their creditors seeking to collect claims, choice between the relief provided by the bankruptcy act and that specified in the state law.

Statement and Authorities

We adopt here the statement and authorities under the Third Assignment of Error.

Second Assignment of Error

The court erred in holding that Title 12, Texas Revised Statutes 1925, "Assignment for Creditors" act (Arts. 261-274) is valid and thereby holding that such state law does [fol. 48] not conflict with and is not repugnant to the National Bankruptcy Act.

Proposition

One who has the privilege of becoming a voluntary bankrupt under the bankruptcy act, cannot ignore the privilege of that law and become a voluntary bankrupt or a voluntary insolvent under a state law and thereby deprive non-assenting creditors of the right expressly given by Congress, to

have the estate of the insolvent administered under the provisions of the bankrupt court through a trustee therein and any such attempted liquidation is invalid, being in conflict with and repugnant to the National Bankruptcy Act.

Statement and Authorities

We adopt here the statement and authorities under the Third Assignment of Error.

Third Assignment of Error

The court erred in declaring Title 12, Texas Revised Statutes 1925, valid as not conflicting with nor repugnant to the National Bankruptcy Act and that the deed of assignment protects the funds in the hands of the assignee from garnishment in a suit timely filed by appellees who are nonassenting creditors and who could not themselves, on account of the smallness of their claim, and without the cooperation of other creditors, invoke the jurisdiction of the bankruptcy court, although the bankruptcy act was open and available to the insolvent corporation who chose the relief provided under the state law in preference to the relief provided under the Federal Act.

Proposition

An attempted liquidation by an insolvent corporation by voluntary assignment for the benefit of creditors under Title 12, Revised Statutes 1925, "Assignment for Creditors" act (Arts. 261-274) is invalid as against non-assenting creditors who could not themselves invoke the jurisdiction of the Federal Court, though the bankruptcy act was open and avail- [fol. 49] able to such insolvents and the attempted liquidation does not protect the funds in the hands of such assignee from garnishment in suit timely filed by such nonassenting creditors.

Statement

Plaintiffs in error are judgment creditors of the Dallas Showcase and Manufacturing Company, having obtained judgment on August 25, 1930, on which there is an unpaid balance of $103.08.

On March 13, 1931, the Dallas Showcase and Manufacturing Company while insolvent executed a deed of assignment to Arthur Star, defendant in error.

The assignment was purely a statutory one according to the agreed statement of facts which contains the following:

"In compliance with the statutes and acting under the authority therein conferred and pursuant thereto, said Arthur Star, garnishee herein, as such assignee, took possession of all of the assets and property of said corporation and proceeded to convert same into cash." (Tr. p. 10 & 14.)

Plaintiffs in error did not accept under the assignment, but duly attacked its validity on April 19, 1931, by suing out a writ of garnishment based on their judgment, the suit originating in the Justice Court, and serving the writ upon Arthur Star, as assignee, who answered that he was not indebted to the Dallas Showcase and Manufacturing Company, nor had he assets of said company, but that he held in his hands as assignee for the benefit of creditors of the Dallas Showcase and Manufacturing Company, the sum of $582.63, which he alleged was not subject to garnishment, and asked to be discharged with his costs and attorney's fees (Tr. p. 3-5).

The amount of the unsecured indebtedness of the Dallas Showcase and Manufacturing Company at the time of the execution of the deed of assignmnet was approximately $11,000.00.

[fol. 50] The record is silent as to the amount of claims held by accepting creditors and it therefore does not appear herein and there is no means of determining by this record whether or not the accepting creditors will receive as much as, or more than, one-third of the amount of their respective claims. It is therefore not made to appear in the record whether the statutory discharge of the unpaid portion of the debts would become operative.

The record is further silent as to what disbursement of money was made by the assignee between the date of the making of the assignment and the service of the writ nor is it shown whether or not there was sufficient stockholder's liability on unpaid stock subscription to create sufficient funds to pay a substantial portion of the indebtedness.

The judgment in the Justice Court was against the garnishee, the defendant in error herein (Tr. p. 7) from which

an appeal was taken to the County Court, in which court a judgment again was rendered against the garnishee, the defendant in error, (Tr. p. 11), the County Court concluding as a matter of law that Title 12 of Revised Civil Statutes 1925, "Assignment for Creditors" act is invalid as applied to the facts involved in this case because it is in conflict with the United States Bankruptcy Law, and being invalid, such deed of assignment did not pass title to the assignee and the funds were subject to garnishment in suit by plaintiffs in error who were non-assenting creditors and who had filed their suit attacking the validity of the judgment within four months of the execution of a deed of assignment (Tr. p. 15), and who could not themselves without the co-operation of other creditors invoke the jurisdiction of the Bankrupt Court.

[fol. 51] An appeal was duly perfected to the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, in which court the judgment of the trial court was reversed and judgment rendered in favor of defendant in error, the Honorable Court of Civil Appeals holding that Title 12 Revised Civil Statutes 1925, "Assignment for Creditors" act, is valid and not in conflict with nor repugnant to the National Bankruptcy Act and being valid, the title to the assets duly passed to the assignee and protected the same from garnishment in suit timely filed by the plaintiffs in error as non-assenting creditors.

Authorities

Johnson v. Chapman Milling Co., 37 S. W. (2d) 776.
International Show Co. v. Pinkus, 278 U. S. 261, 73 L. Ed. 318.
Texas Jurisprudence Vol. 5, p. 74, Sec. 14 & Footnotes 18 & 19.
In re: Gutwillig, 90 Fed. 475.
In re: Gutwillig, 92 Fed. 337.
In re: Louis Neuburger Inc., 240 Fed. 947.
Federal Mail & Express Co., 233 Fed. 691.
In re: Smith, 92 Fed. 135.
Moore v. Cushing, 116 Minn. 142, 133 N. W. 561.
Bryan v. Bernheimer, 181 U. S. 188.
George W. West Co. v. Lea Brothers & Co., 174 U. S. 590.

Weedman Stave Co., 199 Fed. 948.
In re: Utley et al., 235 Fed. 905.
Boese v. King, 108 U. S. 379, 2 S. Ct. 765, 27 L. ed. 760.
Title 12 of the 1925 Revised Civil Statutes (Art. 261-274.)
11 U. S. C. A. p. 19, Note 44.
11 U. S. C. A. Sec. 21, Note 82, p. 213.
Nash Hardware v. Morris, 146 S. W. 876.
Owosso Carriage & Sleigh Co. v. McIntosh & Warren, 179 S. W. 257.
Railway Co. v. Dallas, 85 S. W. 648.

Argument

The primary purpose of the bankruptcy act is to provide for and regulate the distribution of the insolvent's property among his creditors and to do this by the means of the agencies created by the act. This was its sole purpose originally as no provision was made for the discharge of the bankrupt this being a later provision of the law. [fol. 52] Therefore the discharge of the debtor was not the original and primary purpose of the bankrupt law but it was enacted for the benefit of creditors in the administration of the insolvent's assets.

The court below recognizes that the state law is superseded insofar as it provides for a discharge but the court refuses to recognize the original and primary purpose of the bankrupt law in the protection the National act accords the creditors of the insolvent in providing regulations for the distribution of the estate through the agencies created by the act itself.

The United States Supreme Court however recognizes this two-fold purpose of the bankruptcy act when it declared in the International Show Company v. Pinkus decision that the bankruptcy act superseded the state law at least so far as it relates to the distribution of property and releases to be given. (Also see 11 U. S. C. A., p. 19, note 44.)

It will clarify the issues materially, we think, to bear in mind that the insolvent corporation did not turn over its property to the assignee for the payment of its debts so far as it would go,—the property was not turned over for

unconditional distribution among the creditors. It was transferred pursuant to the Texas Statute, imposing conditions tending to secure the debtor's discharge, and as a privilege of sharing in the pro rata distribution, the creditors are required to agree to the provision discharging the unpaid portion of the debts under the terms of the statute.

It will also clarify the issues when we properly establish the exact legal relationship existing between the insolvent corporation and the assignee, as applied to non-assenting creditors who attack the validity of the assignment within four months of the execution of the deed and who could not themselves invoke the jurisdiction of the bankrupt court.

[fol. 53] It was held by the United States Supreme Court in Bryan v. Bernheimer, 181 U. S. 188, as follows:

"The general assignment made by Abraham to Davidson did not constitute Davidson an assignee for value, *but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors.* This general assignment was of itself an act of bankruptcy, without regard to the question whether Abraham was insolvent, Bankrupt Act of July 1, 1898, Chap. 541, Sec. 3 (30 Stat. at L. 545); George M. West Co. v. Lea Bros., 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836."

Even where the assignee sold the assets to an innocent purchaser who bought with the knowledge that proceedings in bankruptcy had been filed, such innocent purchaser did not acquire title even though no trustee in bankruptcy had yet been appointed (Bryan v. Bernheimer, supra).

It was held in the case of in re Smith, 92 Fed. 135:

"Declaring such assignment an act of bankruptcy amounted to a prohibition of the act. *The assignee under the inoperative state law takes no title as against the creditors by the deed of assignment, etc.*"

It is admitted that as between the assignee and those creditors who have accepted under the assignment, title to the assets would pass to the assignee and the accepting creditors would be bound by the assignment.

It is also admitted that as between the assignee and non-assenting creditors who failed to attack the validity of the

assignment within the prescribed four month period, title would pass to the assignee as to them for they are presumed to have acquiesced in the transaction (Mayer v. Hellman, 91 U. S. 496, 23 L. ed. 377).

Even as between the assignee and the trustee in bankruptcy the assignment will not be disturbed if the petition in bankruptcy was filed after four months from the execution of the deed of assignment (Mayer v. Hellman, supra).

Quite a different rule of law exists however in all of the decisions where the deed of assignment was made at a period less than four months prior to the filing of the bank-
[fol. 54] ruptcy proceedings.

It is of course the settled rule of law that as against the trustee in bankruptcy under such circumstances, the assignee acquires no title to the property and he occupied the position merely of an agent of the insolvent for the distribution of his property.

It is also the settled rule of law that as between the assignee and non-assenting creditors, who in the absence of proceedings in the bankrupt court attack the validity of the assignment in an action in the state court title does not pass to the assignee and the property in his hands is subject to seizure by such non-assenting creditors, provided the action is brought within the prescribed four months and provided further that these non-assenting creditors could not themselves invoke the jurisdiction of the bankrupt court.

We therefore urge that as between the Dallas Showcase and Manufacturing Company, an insolvent corporation, and the plaintiffs in error, who are non-assenting creditors, and who attacked the validity of the assignment within the prescribed four months, title did not pass to the assignee as against them.

With the foregoing clearly in mind the issue here for decision is greatly simplified.

As stated by the Court of Civil Appeals, "The question for decision is whether the 'Assignment for Creditors' act, Title 12, Revised Statutes 1925, was suspended by the National Bankruptcy Act," as applied to the agreed facts involved in this case.

Upon this question your petitioners submit as controlling and decisive the opinion of the United States Supreme

Court in International Shoe Co. v. Pinkus, 278 U. S. 261, 73 L. ed. 318, and the opinion of the Texarkana Court of Civil Appeals in Johnson v. Chapman Milling Co., 37 S. W. (2d) 776, in which the facts involved are analogous and [fol. 55] invoke the same rule of law.

The question before the United States Supreme Court in the Pinkus case as stated by that court was (quoting):

"The question is whether, *in the absence of proceedings under the bankruptcy act,* what was done in the chancery court protects the property in the hands of the receiver from seizure to pay the judgment held by plaintiffs in error."

In answering this question, the Supreme Court said:

"In respect of bankruptcies the intention of Congress is plain. *The national purpose to establish uniformity necessarily excludes state regulation.* It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations. * * *"

"And as the passage of the bankruptcy act superseded the state law at least so far *as it related to the distribution of property and release to be given,* plaintiff in error is entitled to have its judgment paid out of the funds in hands of the receiver."

The Texarkana Court of Civil Appeals in Johnson v. Chapman Milling Company, 37 S. W. (2d) 776, held:

"It may be, as argued by appellant, that the Texas assignment law (title 12, R. S. 1925) is not an 'insolvent law' in the sense the Arkansas statute was, but it cannot be doubted, we think, that the effect of holding it to have been operative in the insolvent debtor's (Beasley's) favor would have been to have given him 'choice between the

relief provided by the Bankruptcy Act and that specified' in the Texas statute, a thing the federal Supreme Court said should not be done; and, further, would be to 'complement the Bankruptcy Act or to provide additional or auxiliary regulations,' which that court held a state could not do."

"As we view the matter, giving effect, as he was bound to, to the ruling in the Pinkus case, the trial court could not have held otherwise than he did, and this court, also bound as it is to respect that ruling, cannot do otherwise than affirm the judgment."

The court below has refused to concur with the Texarkana decision and as grounds for dissenting lays down three general propositions which are:

[fol. 56] First. That the Texas Assignment Statute is in no sense an insolvency law.

Second. That the proceedings were good at common law and unaided by the statute, like any other trust, could be enforced in a court of equity in the absence of any statute providing a mode of administration.

Third. That the Texas Statute and the proceedings under it and the effect of such proceedings in relation to the national bankruptcy act are so essentially different from the Arkansas Statute and proceedings thereunder that the case of International Shoe Company v. Pinkus is not controlling.

Your petitioners on the other hand assert and will attempt to here show that the first two propositions have been definitely overruled by the United States Supreme Court in the Pinkus case and second, that there is no essential difference between the operation and effect of these two state laws.

Let us examine these three propositions in their order.

The court below cites as authority the case of Keating v. Vaughn, 61 Tex., 518, 527, an opinion by the Texas Supreme Court handed down nearly fifty years ago. We quote from the opinion as follows:

"The statute in question is in no sense an insolvency law providing for the discharge of a debtor by a com-

pliance with its terms, without the consent of the creditors, etc. * * *"

"The statutes of this state do not provide for the discharge of a debtor from his liability and obligations to fully pay every debt he contracted unless such discharge is consented to by the creditors."

The same reasoning was urged by the Arkansas Supreme Court in support of the validity of the Arkansas statute, the court saying (292 S. W. 996):

"The Arkansas statute with reference to insolvent debtors, simply authorizes a debtor to go in the chancery court and ask for the appointment of a receiver to take charge of his property and distribute the same among his creditors. * * *"

[fol. 57] "The statute does not prohibit creditors from filing petitions in bankruptcy and does not require them to release or relinquish their debt or claim against the debtor. They may file their claim and participate in the proceedings or they may decline to do so and still have their judgment or claim against the debtor."

When the United States Supreme Court overruled this contention on the part of the Arkansas Supreme Court it in effect overruled the reasoning given in Keating v. Vaughn for pronouncing the Texas Statute as being in no sense an insolvency law because it was upon this theory that the court made this pronouncement.

The Supreme Court in the Pinkus case in pronouncing the Arkansas Statute an insolvency law referred with approval to the case of Weedman-Stave Company, 199 Fed. 948, from which we quote:

"The elements of an insolvency law are, insolvency, surrender of property, its administration, by a receiver or trustee, distribution of the assets among the creditors and a provision for priority or other matters not permissible in the absence of such a statute. A provision for the discharge of the debtor from the unpaid balances of his debts is not essential to make it an insolvency law. (Citing authorities.)"

In the Pinkus case the United States Supreme Court pointed out specifically the elements in the Arkansas stat-

ute which made that law repugnant to the National Bankruptcy act and if these elements so specifically pointed out in the Arkansas Statute, are to be found in the Texas law, then the ancient holding in Keating v. Vaughn can no longer be authority upon the question. These elements pointed out by the Supreme Court will be discussed in a later portion of this application wherein a comparison of the two statutes will be presented.

The history of the assignment laws in Texas is one of insolvency.

General Laws of Texas, regular session of the sixteenth legislature, page 57, reads:

[fol. 58] "That every assignment made by an *insolvent debtor or in contemplation of insolvency;* for the benefit of his creditors shall provide, except as herein otherwise provided, for a distribution of all his real and personal property".

Vernon Sales Civil Statutes 1914, Art. 91, is identical with the above.

In view of these express terms, the assignment statute was held to apply only to assignments by insolvent persons (Texas Jurisprudence Vol. 5, p. 74, Sec. 14 and footnotes 18 & 19, for cited cases).

The 1925 Statutes omit the word "insolvent" and the words "in contemplation of insolvency", but the act still deals and attempts to operate with insolvent debtors seeking a distribution of their assets for the benefit of creditors and seeking discharges from the unpaid portion of their debts.

The assignment law was enacted in March 1879, immediately after the *appeal* by Congress of the National Bankruptcy Act and was, no doubt, intended to take the place of, and to be a substitute for the bankrupt law and to give both creditors and debtors in Texas an insolvency law under which estates of insolvents might be administered because there was no federal act then in force to take care of this necessity. The Federal Supreme Court so viewed the State assignment law during that period of time in which the bankruptcy act stood repealed and before the enactment of the present bankruptcy law, the United States Supreme Court having declared in Cunningham, assignee, v. Walace, 125 U. S. 77, 31 L. Ed. 624, that:

"The assignment in question was made under a law of the state of Texas passed on the 24th of March, 1879, immediately after the repeal of the National Bankruptcy Law, and evidently intended to take the place of that law."

[fol. 59] The entire operation of the Texas Assignment Law is one dealing with insolvent's estates and it never has had any other purpose and does not now operate except to administer the estates of insolvents and to create a state insolvency system in substitution for the National Bankruptcy Law.

We do not believe that these two systems of insolvency, the one arising by state statute and the other by the National Bankruptcy Act, will be permitted to operate side by side in competition with each other and we feel that the Texas Supreme Court will in this case give effect to the later opinions of the United States Supreme Court and will hold that the state statute must yield to the Federal act and that it can no longer operate upon persons or upon cases within the purview of the federal statute.

The second proposition relied upon by the court below as set out in Keating v. Vaughn, is, quoting from the earlier decision:

"But is a statute which for the better protection of the creditor prescribes a mode for the administration of the estates of the insolvents under an assignment made by the debtors themselves which would be good at common law unaided by the statute, and like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration."

To the same effect is the opinion in Hajek & Simicek et al. v. Luck, 74 S. W. 305, handed down nearly thirty years ago.

The Arkansas Supreme Court attempted to sustain the validity of the Arkansas Statute also upon this theory, but the United States Supreme Court overruled it in the following language, quoting from the Pinkus case:

"We are of the opinion that the proceedings in the chancery court cannot be given this effect. The enforcement of state insolvency systems, whether held to be in pursuance of statutory provisions or otherwise would neces-

[fol. 60] sarily conflict with the national purpose to have uniform laws on the subject of bankruptcies throughout the United States."

The Arkansas Supreme Court had held that without giving any effect to the statute the insolvent by what was done in the chancery court could compel the same distribution and obtain for himself the same advantages as were contemplated by the insolvency law; in other words, the Arkansas Supreme Court held, as did the early Texas decisions, that unaided by the statute the procedure was valid and the insolvent could obtain the same advantages as were stipulated in the statute itself, but it seems to us that the United States Supreme Court has definitely and decisively overruled the point in the answer that it gave on the very question.

The development of the law upon this subject as disclosed by the trend of the opinions of the United States Supreme Court, clearly indicates to us that it is and will be the policy of the Supreme Court to consider the effect of the operation of the state law in its relationship to the National Bankruptcy Act and if the effect of the state procedure, whether such procedure arises by the provisions of a state statute or otherwise, is to create inconsistencies and confusion or if it gives the insolvent debtors seeking a discharge or their creditors seeking to collect claims, a choice between the relief provided by the bankruptcy act and that specified in the state law, or if it tends to interfere with or complement the bankruptcy act or if it provides additional or auxiliary regulations, then, such proceedings will be deemed necessarily superseded when, as in the instant case, the creditors timely file their suit and do not themselves neglect to exercise the privilege of filing an involuntary petition against the insolvent.

[fol. 61] The Supreme Court has many times referred to the case of in re: Gutwillig, 90 Fed. 475, with approval from which we quote the following:

"From the moment an act of Congress establishing a uniform system for the administration of an insolvent estate takes effect, every local and *private* system for the administration of the same assets, whether originating in the state law or *in the debtor's common law power* to transfer his

property, and regulated, as in this state, by state law is necessarily superseded, provided the bankruptcy act is invoked by creditors within the statutory period of limitation. *Both systems cannot operate side by side as respects* the same estate; the one must necessarily supersede the other; and the state insolvency systems must yield to the *s*ystem established by Congress pursuant to the Constitution. Voluntary assignments of all the debtor's property in trust for creditors are just as incompatible with the purposes of the bankrupt act state insolvency systems, etc."

The third general proposition laid down by the court below, if we understand the opinion correctly is that the Texas Statute and proceedings in relation to the National Bankruptcy Act are so essentially different from the Arkansas Statute and the proceedings thereunder that the Pinkus case does not control here.

However, the Honorable Court of Civil Appeals makes no attempt to compare these two state statutes and does not point out wherein the difference lies.

We deem it essential that this be done, that these two laws be compared both as to their statutory provisions and as to the procedure thereunder and the practical effect upon the administration of the estates of insolvents.

To do this intelligently, we should have before us the Arkansas statute which was before the Supreme Court in the Pinkus case. We therefore incorporate it in this petition. It is as follows:

Digest of the Arkansas Statutes, Crawford & Moses, 1921

Chapter 93

Insolvent Debtors

[fol. 62] 5885. Insolvency-Receivership.—A n y insolvent debtor may file in chancery court of the county in which he resides a complaint, in which one or more of his creditors shall be made defendants, asking to be declared an insolvent, and asking for the appointment of a receiver to take charge of his property and distribute the same among his creditors; and upon the filing of such petition, the chancery court or judge thereof in vacation, shall appoint a re-

ceiver, and, when the receiver shall have qualified, such debtor shall turn over to such receiver all of his property, and for the real estate he shall execute, acknowledge and deliver to such receiver a proper deed of conveyance; but such debtor shall by the court be allowed to select and reserve whatever property may be allowed to him by law as exempt from execution. Act June 26, 1897, p. 115, Sec. 1.

Sec. 5886. Dismissal of Attachments.—The receiver shall intervene in every case in which the property of such insolvent debtor has, within ten days before the filing of such petition, been attached, and upon such receiver's motion, every such attachment shall be dissolved and the attached property shall be turned over to such receiver upon the payment by the receiver of all costs which shall have accrued in the attachment suit. Id. Sec. 2.

(This section does not apply to seizures of property under execution nor require the receiver to intervene therein. McGuire v. Barnhill, 89 Ark. 209.)

Sec. 5887. Debtors to Furnish List of Creditors.—The debtor shall furnish the names and addresses of his creditors, who shall be notified by mail and also by order of publication of the filing of the complaint. Id. Sec. 3.

Sec. 5888. Duties of Receivers.—As soon as the receiver shall have taken the property into his custody, he shall proceed under the direction of the court, or of the judge in vacation, to convert the same into money, and upon final hearing the court, after deducting the cost and paying all public taxes, shall order the proceeds to be distributed among the creditors in the order and with the preferences following:

First. The salaries of employees earned within three months and all laborers' wages shall be paid first (a).

Second. After making the above payments, the funds in hand shall be applied pro rata toward the payment of the claims of all creditors who shall, before the making of the order of distribution, file in the court a stipulation for the use of the debtor to the effect that, in consideration of the preference to be thus obtained, the debtor shall be acquitted of all further liability in personam to such creditor.

Thirs. After making the above payments, the remainder of the funds, if any, shall be paid and distributed equally among the other creditors. Id. Sec. 4.

(a) German Nat'l. Bank v. Young, 114 Ark. 370.

Sec. 5889. Effect of Stipulation.—The stipulation provided for in the preceding section shall not be held or construed to effect or impair the right of such creditor to collect the remainder of his claim, if any, from any other per- [fol. 63] son who is bound to him therefor, or to enforce any other security he may have for his claim, nor shall such stipulation be held to constitute a bar to any action brought or proceeding taken against such debtor for the balance of his debt, if the creditor shall prove that the debtor was guilty of fraud in obtaining such stipulation, either by withholding his property from the receiver or otherwise. Provided, such action or proceeding be commenced within twelve months from the filing of such stipulation. Id. Sec. 5.

Sec. 5890. Lienholder to Make Deduction.—Any creditor having a lien upon any of the debtor's property for his claim shall be required to make a proper deduction for the value of his security before participating in the distribution of the general assets of the debtor. Id. Sec. 6.

Sec. 5891. Partnership.—In case of an insolvent partnership, all or any of the partners may unite in one complaint filed in the county where either one resides; but in such cases all individual as well as firm property and the individual property shall be administered separate, according to the rules of equity. Id. Sec. 7.

Sec. 5892. Distribution.—Except as to the creditors of the first class, as enumerated in Sec. 5888, no order for the distribution of the funds among the creditors shall be made within ninety days from the first publication of the order provided for in Sec. 5887. Id. Sec. 8.

Sec. 5893. Withholding Assets; Penalty.—Any person who shall withhold from the surrender of his assets any property, money or thing of value, to exceed the amount of ten dollars, with intent to cheat, defraud or hinder his creditors in the collection of a debt, shall be deemed guilty of a felony, and punished by imprisonment not less than six months nor more than two years. Id. Sec. 9.

In reference to the foregoing statute, the United States Supreme Court in the Pinkus case declared:

"It is apparent without comparison *in detail* of the provisions of the bankrupt act with those provisions of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national act is in force."

What elements in the Arkansas Statute does the Federal Supreme Court refer to and designate as obnoxious and repugnant to the bankruptcy act which would give rise to these inconsistencies and confusion? They are five in number and are, quoting from the decision:

First. It provides for surrender by insolvent of all his unexempt property to be liquidated by a trustee for the payment of debts under the direction of the court.

Second. It classifies creditors, prescribed the order of payment of their claims.

Third. And gives preference to those fully discharging [fol. 64] the debt in consideration of prorata distribution.

Fourth. The insolvency of Pinkus was covered by its (the bankruptcy act's) provisions, he could have filed a voluntary petition.

Fifth. His application in the state court for the appointment of a receiver was an act of bankruptcy.

Because of these five elements the Arkansas Statute was declared to be an insolvency law and that it operated within the field occupied by the bankrupt court.

Now, if the Texas Statute contains each of these five elements of insolvency, it logically follows that such statute is superseded insofar as it relates to the distribution of property and releases to be given and plaintiffs in error are entitled to have their judgment paid out of the funds in the hands of the assignee as declared in the Pinkus case. Let us compare in detail Title 12, Revised Statutes 1925, with the Arkansas Statute in relation to these five elements of insolvency pointed out in the Pinkus case upon which the Arkansas Statute was declared superseded.

First. Article 261 provides for the surrender of all unexempt property to be administered by the assignee for the

payment of the debts. This is done under the supervision and control of the courts, the assignee being required to qualify and file a bond to be approved by the county or district judge. The statute provides for the removal of the assignee. It provides for the examination of the assignor before the county judge either upon application of a creditor or upon the courts own motion and the court may enforce attendance and obedience. An inventory is required to be filed with the clerk of the court and a final report must be lodged with the court showing in detail all money and property received and how disbursed and the money left on hand is to be deposited with the district court subject to be paid out under a decree of that court.

[fol. 65] Second. The Arkansas law classifies creditors and prescribes the order of payment of their claims. This provision of the statute is under section 5888 sub-division 1, to be found on page 18 of this application and merely provides that the salaries of employees earned within three months and all laborers' wages shall be paid first and afterwards the funds are to be prorated.

The Supreme Court in the Pinkus case referred to this provision by making the following statement:

"In pursuance of the statute, the court ordered the receiver after the expiration of ninety days, to pay the costs, next salaries earned within ninety days and then the claims of those who had duly filed their claim."

This provision of the Arkansas Statute operates exactly as does the Texas Statute as under the procedure in this state the assignee stands, as to the property conveyed, in the place of the assignor, in reference to liens and encumbrances and salaries of employees, taxes, rents, and other liens which are to be paid out of the estate as secured debts. (Texas Jurisprudence Vol. 5, p. 10, Sec. 45, and also Arts. 5483 and 7269 Revised Civil Statutes 1925, as to liens.)

Third. The Texas Statute of course gives preference to accepting creditors as against non-assenting creditors exactly as does the Arkansas Statute.

Fourth. The insolvency of the Dallas Showcase and Manufacturing Company was covered by the bankrupt act and the corporation could have filed a voluntary petition in bankruptcy.

Fifth: The making of the assignment was an act of bankruptcy even without any element of insolvency. (George W. West & Co. v. Lea Bros., 174 U. S. 590.)

It will be seen from the above that instead of there being an essential difference between the two state statutes and [fol. 66] their operation and effect, there is a very striking similarity for every element denounced by the Federal Supreme Court as being repugnant to the National Bankruptcy Act, found in the Arkansas Statute, is likewise found in the Texas Statute and its operation.

Instead of comparing these elements of insolvency, found alike in both the Arkansas and Texas Statutes, the Honorable Court of Civil Appeals contented itself with the observation that there are two distinct lines of decisions—one involving cases arising under general insolvency statutes, as in the Pinkus case, and the other involving cases arising under statutes permitting general assignments for the benefit of creditors, as in Mayer v. Hellman, Boese v. King, Randolph v. Scruggs, and Stellwagen v. Clum, and with the further observation that the Supreme Court in Straton v. New, 51 Sup. Ct. Rep. 465, 469, recognized the two lines of decisions cited and classified the Pinkus case as belonging to the group based on state insolvency statutes that were suspended by the National Bankruptcy Act, etc.

But these decisions referred to as authority will not support the opinion of the Court of Civil Appeals. They do not deal with an issue here presented nor do they deal with any issue that was passed upon by the United States Supreme Court in the Pinkus case.

The two lines of decisions do not turn upon the question here for decision, they deal with the subject of laws that are void whether their invalidity is brought in question within the four month period or not. We are not dealing here with the question of whether or not the Texas Assignment Act is absolutely void under any and all circumstances and against any and all persons, and if we consider the state law merely voidable, requiring its invalidity to be brought in question within the prescribed four months, the answer is, that your petitioners did question the validity [fol. 67] within that prescribed period.

The court below has failed to perceive the distinction to be drawn between these decisons and to observe the effect

that the four month period has upon the correct determination of the issue. The court refers to these cases previously decided by the United States Supreme Court in a general way without applying the very rules found within these decisions whereby this case may be properly decided.

For instance, in the Straton vs. New case, the question certified to the Supreme Court was (17 Am. Bankruptcy Rep. New Series 696):

"Where creditors have obtained and docketed judgments constituting liens on the real estate of defendant, and have instituted a creditors' suit in a state court to marshal and enforce the liens and sell the real estate subject thereto, does the bankruptcy of defendant *occurring more than four months* after the institution of the creditors' suit oust the state court of jurisdiction or vest in the court of bankruptcy power to enjoin further proceedings in the state court?"

It will be noticed that the creditors had obtained judgments and that they had instituted their suit in the state court to marshal and enforce the liens more than four months anterior to the proceedings in bankruptcy and because more than four months had elapsed between the filing of the creditors' suit to marshal and enforce the liens, bankruptcy court would not interfere and the creditors were allowed to proceed. If the procedure had been within the prescribed four months, the bankruptcy court would have had power to enjoin the proceedings in the state court. This decision therefore supports our position because in the case at bar the procedure was within the four months period.

In Mayer v. Hellman the trustee in bankruptcy was not permitted to interfere with the assignment because more than four months had elapsed between the execution of the deed of assignment and the filing of the petition. Compare [fol. 68] this holding with Bryan v. Bernheimer, 181 U. S. 188, also by the United States Supreme Court in which the assignee acquired no title as against the trustee in bankruptcy and where he sold the assets to an innocent purchaser who knew that a petition in bankruptcy had been filed and this sale was made before a trustee was appointed in the bankrupt court, title did not pass to this innocent

purchaser because these proceedings were had within the prescribed four months.

The question therefore in these two opinions turned upon whether or not the proceedings were had within the prescribed period of limitation of four months.

But it may be argued that these are questions which arose in cases where petitions in bankruptcy were filed, while in the case at bar the jurisdiction of the bankrupt court was never invoked but the answer to this is found in the comparison between Boese v. King and International Shoe Company v. Pinkus. In these two latter cases the question was whether recovery would be permitted in the absence of proceedings under the bankruptcy act.

Here again the question was determined upon this four months period, for in Boese v. King the creditors were not permitted to recover because they waited until after the expiration of the time allowed for the filing of the petition in bankruptcy and for the further reason that they could themselves have filed an involuntary petition in bankruptcy against the insolvent without the co-operation of other creditors. In the Pinkus case the creditors were permitted to recover in the state courts because they commenced their procedure within the four months and they could not invoke the jurisdiction of the bankrupt court without the co-operation of other creditors. If they had waited until the four months period had expired, it is clear that recovery would not have been permitted.

[fol. 69] The opinion of the court of Civil Appeals has ignored these distinctions and has dealt with this question by referring to these opinions in a general way and with no attempt to draw those distinctions which the United States Supreme Court clearly and concisely laid down.

It will be further observed that in Mayer v. Hellman and Stellwagen v. Clum, that the Supreme Court was dealing with the Ohio Statute, which contained no provision whatever for a discharge of the insolvent debtor.

The decisions point this out particularly for in Mayer v. Hellman it was said:

"It does not discharge the insolvent, * * * it leaves his after acquired property liable to his creditors precisely as if no assignment had been made."

And In Stellwagen v. Clum, the court declared:

"Indeed there is not now, any more than when Mayer v. Hellman was decided, any attempt in the Ohio law to provide a discharge of the debtor from his existing debts."

In the case of Stellwagen v. Clum, it was a question of compensation to be allowed in the bankrupt court and the court refused to admit the validity of the assignment in answering the certified questions by declaring that compensation could not be allowed under the deed of assignment but it would be allowed only for services that had proven beneficial in the preservation of the estate. The compensation therefore was not allowed under the assignment or by its authority but upon purely equitable grounds and this is found to be the rule in the Federal Courts upon questions of compensation, that it will not be allowed by virtue of the deed of assignment or in recognition of its validity, but where the services tended to preserve the property and therefore accrued to the benefit of the creditors generally then, as a matter of equity compensation would be allowed. But these issues are not involved here and are illustrative of the confusion that asires by referring to these cases as authority.

[fol. 70] The court below discusses the case of Randolph v. Scruggs but overlooks the important fact that the assignment was made in 1903, that the insolvent was a corporation, and under the bankrupt law then existing was not permitted to file a voluntary petition. The assignment therefore did not give thic corporation a choice of remedies as it did not belong to the class permitted at that time to go into bankrupt court voluntarily. It was not until 1910 that this privilege was accorded to corporations. In that case there was no attempt to evade the operation of the bankrupt law nor to interfere with it and until some creditors filed an involuntary petition, the corporation pursued the only course open to it in the distribution of its property. However, in the case at bar the Dallas Showcase and Manufacturing Company could have filed a voluntary petition but instead it chose to have become a voluntary insolvent under the state law and to select a trustee of its own choice and to deny plaintiffs in error the right given under the National Bankruptcy Act to have the

property administered under the supervision of the Federal Court and through the agencies created by the National Act. The primary purpose of the National Bankruptcy Act is to secure to creditors these privileges and rights that have been denied plaintiffs in error herein.

Another decision referred to by the court below in Boese v. King. The construction given to this case by the United States Supreme Court in the Pinkus decision has a direct application to the issues here presented. In that case the court was dealing with the New Jersey Assignment law which was entitled:

"An Act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors."

The Pinkus case contains some distinct declarations as to whether or not the New Jersey Assignment Law was an insolvency law and whether or not it was superseded,— [fol. 71] for instance, the Pinkus decision declares:

"In Boese v. King, 108 US 379, 385, 2 S. Ct. R. 765, 769, 27 L. Ed. 760, this court referring to the effect of the national act upon a *state insolvency law, similar to the Arkansas Statute under consideration, said, etc.*"

In another portion of the Pinkus decision is found:

"The opinion below is not supported by Boese v. King supra. In that case there was an assignment under the New Jersey *insolvency law.*"

Another quotation from the decision is:

"* * *, as the bankruptcy act has superseded the New Jersey insolvency law, etc."

In this we find an express declaration by the Supreme Court in the Pinkus case that the New Jersey Assignment Law is an insolvency law. It is true that recovery was not permitted in Boese v. King but the Pinkus case points out the reason in the following language:

"The receiver was held not entitled to recover *because* the judgment creditors could have secured equal distribution by the institution of bankruptcy proceedings, but in-

stead *they waited* until after the expiration of the time allowed for that purpose, and then by the New York suit sought to obtain preference and full payment."

The action calling in question the validity of the assignment in the above case was not filed until nearly three years after the execution of the deed of assignment and the judgment was not even procured until some time after the assignment was made. It is of course a familiar rule that the assignment would not be set aside where the creditors have accepted or have acquiesced by failing to attack the transfer within the four months period.

The Pinkus case therefore is authority for declaring an assignment statute an insolvency law and declaring that it is superseded and being superseded, insofar as it related to the distribution of the property and releases to be given, plaintiffs in error are entitled to have their judgment paid out of the funds in the hands of the assignee under the agreed facts in this case.

[fol. 72] Assignments have always been held to be repugnant to the policy of the bankrupt law.

Even without any element of insolvency, an assignment is an act of bankruptcy under the express provisions of the bankrupt act.

Even before the bankrupt act so provided it was considered an act of bankruptcy because a general assignment was deemed repugnant to the policies of the bankrupt law.

The United States Supreme Court in Geo. W. West Co. v. Lea Bros., 174 US 590, on this subject had the following to say:

"Under the English Bankruptcy Statutes (as well that of 1869 as those upon which our earlier acts were modeled), and our own bankruptcy statutes down to the act of 1867 the making of a deed of general assignment was deemed to be *repugnant to the policy of the bankruptcy law*, and, as a necessary consequence, this constituted an act of bankruptcy per se. This is shown by an examination of the decisions bearing upon the point, both English and American. In Globe Insurance Co. v. Cleveland Insurance Co., 14 Nat. Bankr. Reg. 311, 10 Fed. Cas. 488, the subject was ably reviewed and the authorities are there copiously collected. The decision in that case was expressly relied upon in re Beisenthal, 14 Blatchf. 146, where it was held

that a voluntary assignment, without preferences, valid under the laws of the state of New York was void as against an assignee in bankruptcy, and this latter case was approvingly referred to in Reed v. McIntyre, 98 US 513 (25:173). So also in Boese v. King, 108 U. S. 379, 385, (27: 760, 763) it was held citing (p. 387 (27:763) Reed v. McIntyre, that whatever might be the effect of a deed of general assignment for the benefit of creditors, when considered apart from the bankrupt act, such a deed was *repugnant to the object of a bankrupt statute,* and therefore was in and of itself alone an act of bankruptcy. The foregoing decisions related to deeds of general assignment made during the operation of the bankrupt act of 1867 (14 Stat. at L. 36, chap 176), or the amendments thereto of 1874 and 1876 (18 Stat. at L. 180, chap. 390; 19 Stat. at L. 102, chap. 235). Neither, however, the act of 1867, nor the amendments to it, contained an express provision that a deed of general assignment should be a conclusive act of bankruptcy. Such consequence was held to arise, from a deed of that description, as a legal result of the clause, in the act of 1867, forbidding assignments with *'intent to delay, defraud, or hinder'* creditors, and from the provision avoiding certain acts done *to delay, defeat, or hinder* the execution of the act. Rev. Stat. 5021. Now when it is considered that the present law, although it only retained some of the provisions of the act of 1867, contains an express declaration that a deed of general assignment [fol. 73] shall authorize the involuntary bankruptcy of the debtor making such a deed, all doubt as to the scope and intent of the law is removed. The conclusive result of a deed of general assignment under all our previous bankruptcy acts, as well as under the English bankrupt laws, and the significant import of the incorporation of the previous rule, by an express statement in the present statute have been lucidly expounded by Addison Brown, J., re Gutwillig, 90 Fed. Rep. 475, 478."

Webster defines the work "repugnant" to mean inconsistent, contradictory, contrary, hostile and offensive.

Besides being repugnant to the policy of the bankrupt

law, an assignment is a potential fraud upon the act. It was held in re Louis Neuburger, Inc., 240 Federal 947:

"It is properly regarded as *potentially a fraud upon the bankruptcy law and upon the creditors, since its necessary effect would be to defeat the operation of the bankruptcy law and to deprive creditors of the protection that that law affords them and the provisions it makes for a speedy and* equal distribution of the estate."

In the case of re Gutwillig 92 Federal 337, it was held:

"We entertain no doubt that a voluntary general assignment, with or without preferences, made by an insolvent deptor within the prescribed four months, *is fraudulent, and intended by him to 'hinder delay and defraud' creditors, within the meaning of the section, because its necessary effect is to defeat the operation of the bankrupt act and the rights of the creditors to such an administration of the assets as that act is intended to provide. The reasons for this conclusion,* and the authorities in support of it, are so fully and satisfactorily set forth in the opinion of Judge Brown in the court below that we do not deem it necessary to enlarge upon them. They are summarized in the following extract from his opinion:"

And quoting further from the same opinion:

"The general purpose of bankrupt laws, and of the present act, is not only to administer the assets of insolvent debtors on the basis of equality, but *to secure that result by giving to the creditors, and not to the debtor, the selection of the person intrusted with the administration.* To permit the administration to be committed by an insolvent debtor, who is on the heels of an adjudication of bankruptcy, to a trustee selected by himself, and thus be wholly withdrawn from the supervision of the bankrupt court, is irreconcilable with any reasonable view of the purpose [fol. 74] of such legislation. Hence it has been almost uniformly adjudged that any disposition of his property by a debtor intended to accomplish that purpose is a fraud upon the creditors, who have a right to invoke its protection. That such disposition is not one which is fraudulent at common law, is immaterial. It suffices if its necessary

effect is to defraud, hinder, or delay creditors in their rights and remedies under the bankrupt law."

In the case of re Federal Mail and Express Co., 233 Fed. 691, the court speaks of assignments as an administration which affords the greatest facility for concealment of assets and that it is a method of administration which involves constant problems as to the jurisdiction of the respective courts.

In the case of in re Smith, 92 Fed. 135, it was held that the assignee was without a shred of title or lawful possession of the bankrupt's estate.

In Minnesota it has long been the settled law that a creditor who has not assented to an assignment for the benefit of creditors is entitled to attack it in any appropriate porceedings and is not required to resort to a petition in bankruptcy as a means of avoiding it. (Moore v. Cushing (1911) 116 Minn. 142, 133 N. W. 561, Ann. Cas. 1913 A. 816.)

The question of a common law assignment is not presented here for decision. The case was tried on an agreed statement of facts which contained the following:

"In compliance with the statutes and acting under the authority therein conferred and pursuant thereto, said Arthur Star, garnishee herein, as such assignee, took possession of all of the assets and property of said corporation and proceeded to convert same into cash" (Tr. p. 10 & 14).

As the attempted liquidation by the insolvent corporation was admittedly under the Texas Assignment Law, there is not in this case a need for this court to determine the effect of a common law assignment any more than the need existed in the Pinkus case.

But it is contended that the insolvent corporation had the common law power or right to dispose of all of its assets and that this right is unrestricted and paramount [fol. 75] and beyond the control of the Federal Congress even acting under the Constitutional warrant.

The theory seems to be advanced that this common law power is supreme and not subject to restriction either by state or federal legislation.

But the court below has lost sight of the fact that the state may impose restraint even upon that natural right

where such restraint is reasonable and is imposed for the common good.

This authority of the state to reasonably regulate business transactions is of course universally acknowledged in the decisions of all the jurisdictions, including the decisions of our own state.

An example of this is clearly illustrated by the provisions of Article 4001 of the Revised Statutes 1925. Under it even a perfectly solvent merchant is deprived of the right to transfer in bulk any part or the whole of a stock of merchandise and fixtures except in the natural course of trade and any attempt to transfer his merchandise and fixtures in bulk is declared void as against the creditors unless the requirements of the statute are complied with.

The merchant owns the property and of course has the natural right to dispose of it as he sees fit, subject however to such regulations and restrictions as the state may impose for the common good.

This was expressly held in Nash Hardware v. Morris, 146 S.W. 876, from which we quote:

"The object of government is to impose that degree of restraint upon human actions which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create private rights. The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a re-[fol. 76] straint as will prevent the infliction of injury upon others in the enjoyment of them; it involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and the natural law; 'Sic utere tuo, ut alienum non laedas'. The power of the government to impose this restraint is called 'police power'. Tiedeman's Lim. of Police Power."

Also, in the case of Owosso Carriage & Sleigh Co. v. McIntosh & Warren, 179 S.W. 257, we find the following:

"The defendants in error assail the constitutionality of the act. If the act is an unreasonable restraint of the natural rights of the owners of merchandise over their control and use of their property, and their right of con-

tract connected therewith, it should be held unconstitutional; but, if it is merely a proper exercise of the police power of the state in a wholesome restraint upon the said natural rights for the common good, then the said act would not be repugnant to the organic law. An unreasonable restraint of the natural rights of the owners of merchandise over the control and use of their property, and their right of contract connected therewith, would be intolerable, and violative of rights guaranteed under the Constitution; but a wholesome restraint upon the natural rights of such owners for the common good would be within the police power of the state, and therefore valid."

In the case of Railway Co. v. Dallas, 85 S.W. 648, it was declared that the legislature may in the exercise of the police power regulate by reasonable requirements the business transactions of its citizens.

The right to regulate the transfer of property by insolvents has long been recognized and is restricted by many provisions of our statutory law. These statutes seek to protect the creditors and the right of the state to so regulate such transfers has never been denied by any of the decisions.

When the Federal Constitution imposed upon Congress the duty to provide uniform regulations for the handling of insolvents' estates throughout the United States, it impowered Congress to impose upon the citizens a reasonable restraint in the disposition of their property, such restraint being for the benefit of the creditors and for the common good.

[fol. 77] Can it reasonably be questioned that Congress had the power in regulating and providing uniform provisions for the administration of estates of insolvents to reasonably restrict the common law right of the citizen to dispose of the property as he sees fit?

Can it be thought that an insolvent corporation has a natural right to override the provisions of the National Bankruptcy Act and that its common law right is superior and supreme over the power of Congress to reasonably regulate the disposition of its property when it attempted to liquidate by reason of insolvency?

But we question that a person has a common law right to dispose of his property while insolvent by transferring

it to a third person and thus establish immunity and exemption to the property which without such transfer would be subject to seizure by his creditors.

If this common law right to dispose of property is superior to the power of Congress to regulate the same, then the National Bankruptcy act could not affect it and when an insolvent made an assignment for the benefit of creditors and the assignee qualified and took charge of the property and commenced to administer it, this assignee would have acquired title to the assets that would be superior to that of the trustee in bankruptcy even when the petition in bankruptcy was filed within the four months period.

But the decisions uniformly overrule this contention and it is the settled law that as against the trustee in bankruptcy the assignee does not have even a shred of title and if he attempts to administer the estate he will be enjoined from doing so and will be required to deliver the property to the trustee.

The Court of Civil Appeals admits in its opinion that the assignment constituted a potential fraud upon the creditors of the Dallas Showcase and Manufacturing Com- [fol. 78] pany and it is the holding of Federal Courts that an assignment is a fraud also upon the National Bankruptcy Act.

It destroys the primary purpose of the bankrupt- law which is that the estate of the insolvent might be administered under the supervision of the Federal Court for the benefit of creditors and through the agencies created by the act.

The insolvent corporation has attempted to defeat this primary purpose of the bankrupt- law and to require the plaintiffs in error to submit to the administration of the estate by an agent that he himself has selected and appointed. The insolvent having proven himself incapable of properly managing his own affairs, is deemed competent to select for the plaintiffs in error, the assignee and if the procedure is upheld, plaintiffs in error must accept as their agent not a person of their own choosing but one chosen by the insolvent.

There are abundant authorities holding that assignments promote concealment, preference and fraud and that they are the vehicle by which most any sort of administrative

charges and expenses may be run in and the proceeds dissipated and the sale of the property being through an assignee of the insolvent's choice and being a friendly procedure inaugurated sometimes by a major creditor, preference is created in the disposition of the assets and the sale made under circumstances not tending to protect all of the creditors' interests.

The declaring invalid of such a private system of insolvency will leave few to mourn its passing, except indeed those who have — and are profiting by the preference, concealment and fraud made possible by this loose and unsatisfactory system of insolvency. One would have to shut his eyes to the history of the assignment for the benefit of [fol. 79] creditors porcedure to fail to observe these appalling defects.

To protect the creditors against these very evils and to give to the creditors an insolvency system under proper Federal protection was the primary purpose of the National Bankruptcy Act.

Plaintiffs in error urge that under the Federal Constitution and under the National Bankruptcy Act, they had the right to have this property administered in the Federal court and through the agencies created by Congress,—that this right has been denied them by the opinion of the Honorable Court of Civil Appeals. Their hands are tied and they are powerless to obtain the very rights and privileges intended to be safeguarded to them by the Federal Act.

If they do not accept under the assignment, they cannot share in the distribution. If they do accept under the assignment and as much as one-third is paid, they are bound by the terms of the assignment and they cannot maintain a suit for the unpaid portion of the debt. Hajek & Simicek et al. v. Luck, 74 S. W. 305. They cannot refuse to accept under the assignment and garnishee the assignee according to the opinion below. Whichever way they turn the insolvent corporation is permitted to proceed in violation of these creditors' rights unmolested and without interference. The creditors are required to submit to the administration of the estate through an agent of the insolvent's own choice, whether they wish to or not and in spite of this the court below holds that the procedure is in harmony with the National Bankruptcy Act and that these creditors' rights have not been infringed upon. It should be bourne

in mind that these creditors had an unpaid judgment that they were seeking to collect and that the assets of this corporation were subject to seizure for the payment of the judgment and that the insolvent corporation turned these assets over to a third party and is now claiming immunity [fol. 80] because of such transfer.

The facts agreed to in the trial court do not disclose what dividend the assignment would pay as the record is silent as to the number of *accepting* creditors and the amounts of their claims and without these facts, there is no fact presented to disclose whether or not the assenting creditors would receive as much, or more than, one-third of their respective claims. They must file their claims agreeing to the discharge under the statutory provisions. Your petitioners did not desire to do this nor did they consent to waive their right to have the estate administered in the bankrupt court and through the agencies created by the National Act.

The facts involved in this case are analogous and invoke the same rule of law as those involved in the Pinkus decision.

We think it clear that the Texas Statute contains each of the five elements of insolvency that the United States Supreme Court found in the Arkansas law and because of which the Supreme Court pronounced that state law in conflict with and repugnant to the National Bankruptcy Act.

The facts being in all respects similar and the Texas law containing each of the objectional features found in the Arkansas Statute, we submit that the decision of the United States Supreme Court in International v. Pinkus is decisive and in all respects supports the holding of the trial court that as applied to the facts involved herein, that such procedure is invalid and being invalid, does not protect the funds in the hands of the assignee and plaintiffs in error are entitled to have their judgment paid out of such funds. We submit that the opinion of the Honorable Court of Civil Appeals is in direct conflict with the opinion of the United States Supreme Court on this very question.

[fol. 81] Wherefore your petitioners respectfully pray that this petition be granted, and that the writ of error be allowed for the correction of the errors of law herein complained of and upon hearing hereof that the judgment

of the Court of Civil Appeals be reversed and that the judgment of the County Court be affirmed.

The attorneys representing the defendant in error are: William Andrews, Jr., and Renfro, Ledbetter and McCombs, of Dallas, Texas.

Respectfully submitted.

C. Huggins, C. Huggins, of Sherman, Texas, Attorney for Plaintiffs in Error.

[File endorsement omitted.]

(Attached to Application are the following letters):

"Sherman, Texas, December 10, 1931.

Clerk of Supreme Court of Texas, Austin, Texas.

DEAR SIR:

Re Helen C. Johnson et al., Plaintiffs in Error, vs. Arthur Star, Defendant in Error

You will receive an application for writ of error from the Clerk of the Court of Civil Appeals at Dallas in the above matter.

Upon receipt of this application I would appreciate it if you would add the law firm of Webb & Webb of Sherman, Texas, as attorneys for plaintiffs in error as they are joining me in this application.

Thanking you for your courtesy in the matter, I remain, with best wishes.

Yours very truly, C. Huggins.

[fols. 82 & 83] "Sherman, Texas, Dec. 12, 1931.

Clerk of Supreme Court of Texas, Austin, Texas.

DEAR SIR:

Re Helen C. Johnson, Plaintiff in Error, vs. Arthur Star, Defendant in Error

Will you kindly add as one of the attorneys for plaintiff in error, Hon. Fred J. Dudley, whose address is Mercantile Bank Building, Dallas, Texas, as he is joining me in this appeal.

If the record has not already reached you from the clerk

of the Court of Civil Appeals it will in the next day or two.

Yours very truly, C. Huggins.

Carbon. Copy to Hon. Fred J. Dudley, Atty-at-law, Mercantile Bank Bldg., Dallas, Texas.

[fol. 84] IN SUPREME COURT OF TEXAS

App. No. 18589

HELEN C. JOHNSON et al., Plaintiffs in Error,

vs.

ARTHUR STAR, Defendant in Error

OPINION—Filed March 23, 1932

Per CURIAM:

The opinion of the Court of Civil Appeals for the Fifth District in this case is in conflict with that of the Court of Civil Appeals for the Sixth District in the case of Johnson vs. Chapman Milling Co., 37 S. W. (2d) 778. We are convinced, however, that the opinion of the first named Court in the instant case is correct, and that the questions at issue have been definitely settled by this Court in the cases of Patty-Joiner vs. Cummins, 93 Texas, 598, and Haijek vs. Luck, 96 Texas, 517. We accordingly refuse the application for writ of error.

March 23, 1932.

[File endorsement omitted.]

[fol. 85] IN SUPREME COURT OF TEXAS

App. No. 18589

HELEN C. JOHNSON et al.

vs.

ARTHUR STAR

From Grayson, 5th Dist.

(Per Curiam Opinion)

JUDGMENT—March 23, 1932

This day came on to be heard the application of plaintiff- in error for a writ of error to the Court of Civil Ap-

peals for the Fifth District, and the same having been duly considered, it is ordered that the application be refused (written opinion); that applicants, Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and Jno. J. Louis, pay all costs incurred herein.

[fols. 86-88] Petition for rehearing, covering three pages, filed April 4, 1932, omitted from this print. It was denied and nothing more by order of April 21, 1932.

[fol. 89] IN SUPREME COURT OF TEXAS

[Title omitted]

For Rehearing of Application

ORDER OVERRULING MOTION FOR REHEARING—April 21, 1932

Overruled.

[fol. 90] IN SUPREME COURT OF TEXAS

[Title omitted]

Petition for Appeal, Assignments of Error, and Prayer for Reversal—Filed April 23, 1932

PETITION FOR APPEAL

To the Chief Justice of the Supreme Court of Texas:

Considering themselves aggrieved by the final decision of the Supreme Court of Texas in the above entitled cause, appellants, Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and John J. Louis, trading as S. C. Johnson & Sons, hereby pray that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon.

ASSIGNMENTS OF ERROR

And the said appellants, Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and John J. Louis, trading as S. C. Johnson & Sons, assign the following errors in the record and proceedings in said cause.

First

The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statute-, 1925, (Assignment for Creditors, Articles 261-274) is valid and that such state law does not conflict with and is not repugnant [fol. 91] to article 1, Section 8, cl. 4, of the Constitution of the United States.

Second

The Supreme Court of Texas erred in refusing the application for writ of error and declaring the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statute-, 1925, (Assignment for Creditors, Articles 261-274) is valid and thereby holding that such state law does not conflict with and is not repugnant to the National Bankruptcy Act.

Third

The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statute-, 1925, is valid and is not conflicting with nor repugnant to the National Bankruptcy Act and that the deed of assignment protects the funds in the hands of the assignee from garnishment in a suit timely filed by appellees who are non-assenting creditors and who could not themselves on account of the smallness of their claim- and without the co-operation of other creditors, invoke the jurisdiction of the bankruptcy court, although the bankruptcy act was open and available to the insolvent corporation which chose the relief provided under the state law in preference to the relief provided under the federal act.

Fourth

The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct and that the ques-

tions at issue have been definitely settled by the Supreme [fol. 92] Court of Texas in the cases of Patty-Joiner vs. Cummins, 93 Texas, 598, and Haijek vs. Luck, 96 Texas, 517, and thereby holding in favor of the validity of Title 12, Texas Revised Statutes 1925, and declaring the state law valid and binding both as it relates to the distribution of the property under the assignment and the releases to be given thereunder for the unpaid portion of the debts.

PRAYER FOR REVERSAL

For which errors appellants, Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis and John J. Louis, trading as S. C. Johnson & Sons, pray that the said judgment of the Supreme Court of Texas dated March 23, 1932, and the judgment of the Court of Civil Appeals in the above entitled cause be reversed and a judgment rendered in favor of the said appellants and for costs.

Fred J. Dudley, of Dallas, Texas, and G. P. Webb, Spearman Webb, and C. Huggins, of Sherman, Texas, Attorneys for Appellant. C. Huggins.

[fol. 92½] [File endorsement omitted.]

[fol. 93] IN SUPREME COURT OF TEXAS

App. No. 18589

HELEN C. JOHNSON et al., Plaintiffs in Error,

vs.

ARTHUR STAR, Defendant in Error

ORDER ALLOWING APPEAL—Filed June 15, 1932

The appellants in the above entitled suit, and each of them having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Texas on the 23rd day of March, 1932, and from each and every part thereof, and having presented and filed their petition for appeal, assignments

of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the state of Texas in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Texas shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within thirty days of this date.

[fol. 94] And it is further ordered that security for costs on appeal be fixed in the sum of $500.00.

Dated June 15, 1932.

C. M. Cureton, Chief Justice, Supreme Court of Texas.

[fols. 94½-99a] [File endorsement omitted.]

[fol. 100] In Supreme Court of Texas

[Title omitted]

Order Extending Time—Filed July 12, 1932

Good cause appearing therefor, and upon motion of Spearman Webb, attorney for appellants herein, it is hereby ordered by the undersigned, the Chief Justice of the Supreme Court of Texas, the Judge who signed the order allowing the appeal and issued the citation herein, that appellants be, and they are hereby granted thirty days' additional time from and after July 16, 1932, as fixed by me in the original citation issued in said matter wherein which to file the certified copy of the record on appeal herein in the office of the Clerk of tthe Supreme Court of the United States.

Dated at Austin, Texas, this the 12 day of July A. D. 1932.

C. M. Cureton, Chief Justice of the Supreme Court of Texas.

[fols. 100½-103] [File endorsement omitted.]

[fol. 104] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 10, 1932

Come now the appellants in the above entitled cause and state that the points upon which they intend to rely in this Court in this cause are as follows:

First

The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statute, 1925, (Assignment for Creditors, Articles 261-274) is valid and that such state law does not conflict with and is not repugnant to Article 1, Section 8, cl. 4, of the Constitution of the United States.

[fol. 105]

Second

The Supreme Court of Texas erred in refusing the application for writ of error and declaring the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statutes, 1925, (Assignment for Creditors, Articles 261-274) is valid and thereby holding that such state law does not conflict with and is not repugnant to the National Bankruptcy Act.

Third

The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statute, 1925, is valid and is not conflicting with nor repugnant to the National Bankruptcy Act and that the deed of assignment protects the funds in the hands of the assignee from garnishment in a suit timely filed by appellees who are non-assenting creditors and who could not themselves on account of the smallness of their claim and without the co-operation of other creditors, invoke the jurisdiction of the bankruptcy court,

although the bankruptcy act was open and available to the insolvent corporation who chose the relief provided under the state law in preference to the relief provided under the federal act.

Fourth

The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct, and that the questions at issue have been definitely settled by the Supreme Court of Texas in the cases of Patty-Joiner vs. Cummins, 93 Texas, 598, and Haijek vs. Luck, 96 Texas, 517, and thereby holding in favor of the validity of Title 12, Texas Revised Statute 1925, and declaring the state law valid and binding both as it relates to the distribution of the property under the assignment and the releases to be given thereunder for the unpaid portion of the debts.

[fol. 106] And appellants further state that only the following parts of the record as filed in this Court need be printed by the clerk for hearing in this case:

(See attached stipulation.)

Spearman Webb, Spearman Webb, Sherman, Texas, Counsel for Appellants.

[fols. 107 & 108] State of Texas,
County of Grayson:

Spearman Webb, being first duly sworn, deposes and says that he is attorney for appellants in the above entitled cause and that he did cause to be deposited in the United States mail, postage prepaid, registered, a copy of the annexed and foregoing statement of points to be relied upon and designation of parts of the record to be printed, addressed to Hon. William Andress, Jr., attorney for appellee, Mercantile Bank Building, Dallas, Dallas County, Texas, on July 28, 1932, in time to reach said addressee in the ordinary course of the mails by July 29, 1932.

Spearman Webb.

Subscribed and sworn to before me this the 28th day of July, 1932. D. H. Woodrow, Notary Public in and for Grayson County, Texas. (Seal of Notary Public, County of Grayson, Texas.)

[fol. 109] [File endorsement omitted.]

[fol. 110] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD

It is stipulated and agreed by and between Spearman Webb, counsel for appellants, and William Andress, Jr., counsel for appellee, that, in order to save expense in the printing of the record herein, the following portions of the record, the same being sufficient to show the errors complained of, shall be printed, and no more, to wit:

Application for Garnishment, Justice Court, page 1 of Transcript.

Garnishee's Answer filed in Justice Court, page 3.

Judgment, Justice Court, page 6.

Appeal bond to County Court, page 9.

Agreed Statement of Facts, page 10.

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Findings of Fact and Conclusions of Law, page 14.

Assignments of Error, page 16.

Cost and Supersedeas Bond, page 17.

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Opinion Court of Civil Appeals, page 21.

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Motion for Rehearing in Court of Civil Appeals, page 31.

Order Overruling Motion for Rehearing, page 42.

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Petition for Allowance of Appeal, Assignments of Error and Prayer for Reversal, page 90.

[fols. 111 & 112] Allowance of Appeal, page 93.

Order granting extension of time, page 100.

Statement of points relied upon by appellants.

It is further stipulated and agreed that, if from oversight or omission, any necessary part of the record be not

thus printed, the appellants have the right to print, or may be required by appellee to print, any further or additional portions thereof.

Dated July 27, 1932.

Spearman Webb, Counsel for Appellants. Wm. Andress, Jr., Counsel for Appellee.

[fol. 113] [File endorsement omitted.]

Endorsed on cover: File No. 36,979. Texas Supreme Court. Term No. 282. Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis, et al., etc., appellants, vs. Arthur Star. Filed August 4, 1932. File No. 36,979.

FILE COPY

FILED
AUG 17 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 282.

HELEN C. JOHNSON, HERBERT F. JOHNSON, JR., HENRIETTA J. JOHNSON, AND JOHN J. LOUIS, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF S. C. JOHNSON & SON, APPELLANTS,

VS.

ARTHUR STAR, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR APPELLANTS.

SPEARMAN WEBB,
Sherman, Texas,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

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VS.

ARTHUR STAR, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR APPELLANTS.

STATEMENT AS TO JURISDICTION OF APPEAL.

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this court to review the above entitled cause on appeal respectfully represent:

A.

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The Act of February 14, 1925, 43 Stats. L. 937, United States Code, Title 28, Section 344, provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "(a) A final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution and treaties or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Act of January 31, 1928, as amended by Act of April 26, 1928, United States Code, Title 28, Section 861 (a) substituted an appeal for a writ of error in all cases.

B.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The decree sought to be reviewed was entered on March 23, 1932 (R. p. 84).

Motion for rehearing was filed April 4, 1932 (R. p. 86), within the time prescribed by the rules of the Supreme Court of Texas. The motion for rehearing was denied April 21, 1932 (R. p. 89).

The application for appeal was presented to the Chief Justice of the Supreme Court of Texas and the appeal allowed on June 15, 1932 (R. p. 94).

On July 12, 1932, upon motion of appellants the Chief Justice of the Supreme Court of Texas granted thirty days additional time to file the certified copy of the record on appeal in the office of the Clerk of the Supreme Court of the United States, the time being extended thirty days from and after July 16, 1932 (R. p. 100).

C.

NATURE OF THE CASE AND RULING BELOW.

On March 13, 1931, the Dallas Showcase and Manufacturing Company, a corporation, while insolvent executed to Arthur Star, appellee herein, a deed of assignment for the benefit of creditors, under Title 12, Texas Revised Statutes 1925 (Assignment for Creditors Act, Art. 261-274).

Appellants are judgment creditors of the Dallas Showcase and Manufacturing Company and for the purpose of satisfying the judgment amounting to $103.05, on April 9, 1931, sued out a writ of garnishment and served it upon Arthur Star, appellee herein.

Appellee answered the writ of garnishment asserting that he received the assets of the insolvent corporation under the authority of the deed of assignment and acting under Title 12, Texas Revised Statutes 1925, he proceeded to convert the same into cash and had on hand the sum of $582.63, held by him as assignee, for

the benefit of creditors, and in trust for such creditors, and that the Dallas Showcase and Manufacturing Company had no interest therein and that the fund is not subject to garnishment for claims against the Dallas Showcase and Manufacturing Company.

In the trial court appellants brought in question the validity of Title 12, Texas Revised Statutes 1925 (Assignment for Creditors Act), on the ground that such act was suspended and superseded by the National Bankruptcy Act and was in conflict with and repugnant to Article 1, Sec. 8, cl. 4, of the Constitution of the United States, and the National Bankruptcy Act.

The trial courts held that the Texas Statute, Assignment for Creditors Act, is invalid, being in conflict with the United States Bankruptcy Act and therefore did not protect the funds in the hands of the assignee from garnishment.

The assignee appealed to the Court of Civil Appeals asserting the validity of the Texas statute and appellants herein asserting its invalidity as being in conflict with the National Bankruptcy Act and Constitution of the United States (Article 1, Sec. 8, cl. 4).

The Court of Civil Appeals upheld the Assignment for Creditors Act and held the Texas law was not in conflict with nor repugnant to the National Bankruptcy Act.

Appellants sued out a writ of error to the Supreme Court of Texas again asserting the invalidity of Title 12, Assignment for Creditors Act, as being in conflict with the National Bankruptcy Law and Article 1,

Section 8, cl. 4 of the Federal Constitution, and the Texas Supreme Court held that such Texas Assignment for Creditors Act is valid and is not in conflict with Article 1, Section 8, cl. 4, of the Constitution of the United States and the National Bankruptcy Act, and held in favor of the validity of such state law.

D.

CASES BELIEVED TO SUSTAIN JURISDICTION.

The following decisions of this court are believed to sustain the jurisdiction of this appeal:

International Shoe Co. v. *Pinkus,* 278 U. S. 261, 73 L. ed. 318.

Boese v. *King,* 108 U. S. 379, 2 S. Ct. 765, 27 L. ed. 760.

Respectfully submitted,

Spearman Webb

Counsel for Appellants.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 282.

HELEN C. JOHNSON, HERBERT F. JOHNSON, JR., HENRIETTA J. JOHNSON, AND JOHN J. LOUIS, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF S. C. JOHNSON & SON, APPELLANTS,

VS.

ARTHUR STAR, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR APPELLANTS.

SPEARMAN WEBB,
Attorney for Appellants.

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a. The assignment in question is purely under the Texas Statute and the question of the validity of a common law assignment is not raised 13

b. Appellants could not themselves, on account of the smallness of their claim and without the cooperation of other creditors, invoke the jurisdiction of the bankruptcy court, and they timely (within four months) proceeded by garnishment against the assignee 14

c. This court has held under such facts that a judgment creditor may proceed in the State Court and attach funds in the hands of the trustee or assignee who attempts to hold the funds by virtue of the invalid state insolvency law 14

d. The Texas Assignment Act is an insolvency law, providing as a condition for the privilege of sharing in the distribution that the debtor will be discharged by a compliance with the statutory terms and has in it each of the five elements found in the Arkansas Statute and referred to and designated by this court as obnoxious and repugnant to the bankruptcy act 15

e. Intolerable inconsistencies and confusion would result if the state insolvency law be given effect while the national act is in force 24

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 282.

HELEN C. JOHNSON, HERBERT F. JOHNSON, JR., HENRIETTA J. JOHNSON, AND JOHN J. LOUIS, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF S. C. JOHNSON & SON, APPELLANTS,

VS.

ARTHUR STAR, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR APPELLANTS.

1.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Supreme Court of Texas is printed in the record, page 58. It is reported in 47 S. W. (2d) 608.

The opinion of the Court of Civil Appeals declared to be correct by the Supreme Court of Texas is printed in the record, page 13, and reported in 44 S. W. (2d) 429.

The opinion of the Supreme Court of Texas adopts the reasoning of the same court in *Patty-Joiner and Eubank Company* v. *Cummins*, 93 Texas 598, 57 S. W. 566, and in *Hajek and Simicek* v. *Luck*, 96 Texas 517, 74 S. W. 305, and holds that the questions at issue here have been definitely settled in Texas by these former holdings. For convenience these opinions are printed in this brief on pages 43 and 50, respectively.

STATEMENT OF THE CASE.

Appellants are judgment creditors of the Dallas Showcase and Manufacturing Company, having obtained a judgment in the state courts, on which there is an unpaid balance of $103.08.

On March 13, 1931, the Dallas Showcase and Manufacturing Company, a corporation, while insolvent, executed a deed of assignment to Arthur Star, the appellee herein.

The assignment was purely a statutory one according to the agreed statement of facts which contains the following:

> "In compliance with the statutes and ACTING UNDER THE AUTHORITY THEREIN CONFERRED AND PURSUANT THERETO, said

> Arthur Star, garnishee herein, as such assignee, took possession of all of the assets and property of said corporation and proceeded to convert same into cash" (R. p. 8).

Appellants did not accept under the assignment, and duly attacked its validity on April 19, 1931, by suing out a writ of garnishment and serving the same upon Arthur Star, assignee, who answered (R. p. 2), that he was not indebted to the Dallas Showcase and Manufacturing Company, nor had he assets of said company, but that he held in his hands as assignee for the benefit of creditors of the Dallas Showcase and Manufacturing Company the sum of $582.63, which he claimed to hold under the authority of Title 12, Texas Revised Civil Statutes 1925, "Assignment for Creditors Act" (Articles 261-274), which funds he alleged were not, for that reason, subject to garnishment and asked to be discharged.

So far as the record discloses, none of the creditors have accepted under the assignment. The only statement in the record in regard to the creditors is a statement of the amount owing by the insolvent corporation to unsecured creditors, the record being silent as to the amount of claims held by *accepting* creditors, if any there be. There is no means of determining by this record whether or not as much as or more than one-third of the amount of the respective claims of *accepting creditors* will be paid. It is therefore not made to appear in the record whether the STATUTORY DISCHARGE of the unpaid portion of the debts would become effective and *appellants would necessarily have*

to consent to the statutory provision discharging the unpaid portion in the event the necessary one-third was eventually paid.

The trial courts held that Title 12 of Revised Civil Statutes 1925, Assignment for Creditors Act (Arts. 261-274), as applied to this case is invalid, being in conflict with and repugnant to Art. 1, Sec. 8, cl. 4 of the Constitution of the United States and the National Bankruptcy Act (R. p. 11), and that such deed of assignment did not pass title to the assignee as against appellants who were non-assenting creditors and who timely (within four months) proceeded by garnishment against the assignee and who could not because of the smallness of their claim and without the cooperation of other creditors avail themselves of the Bankruptcy Act, and that the funds were therefore subject to garnishment or attachment.

The assignee appealed to the Court of Civil Appeals asserting that the trial court erred in holding Title 12, Rev. Tex. St. 1925, is invalid and in conflict with and repugnant to the Federal Constitution and the National Bankruptcy Act which court held in favor of the validity of the state law (R. p. 13).

Appellants sued out a writ of error to the Supreme Court of Texas, again asserting the invalidity of Title 12, Revised Statutes 1925, as being in conflict with the Federal Constitution and the Bankruptcy Act and the Supreme Court of Texas held in favor of the validity of the State law (R. p. 58).

To which holding appellants have cited error (R. p. 59) and have brought this case for review by this Honorable Court.

The Statutes in Question.

Title 12, Revised Civil Statutes 1925, Assignment for Creditors Act (Articles 261-274), reads as follows:

> Art. 261. GENERAL ASSIGNMENT.—Every assignment made by a debtor for the benefit of his creditors shall provide for a distribution of all of his real and personal estate among all of his creditors consenting thereto, in proportion to their respective claims, and however made or expressed shall have the effect aforesaid and shall be construed to pass all such estate, whether specified therein or not. The term "real and personal estate" shall not include property exempt by law from execution (Acts 1879, p. 57; G. L., Vol. 8, p. 1357).
>
> Art. 262. DETAILS OF ASSIGNMENT.—Assignments shall be in writing and proved or acknowledged and recorded in the manner provided by law for conveyances of real estate, and the debtor shall annex to such assignment an inventory containing the following statement:
>
> 1. A list of all the creditors of such debtor or debtors;
> 2. The place of residence of each creditor, if known;
> 3. The sum owing to each creditor, and the nature of the debt or demand;
> 4. The consideration of such indebtedness in each case, and the place where such indebtedness arose;
> 5. A statement of any existing judgment or security for the payment of any such debt;

6. An inventory of all such debtor's estate at the date of such assignment, both real and personal, and any incumbrances existing thereon, and of all vouchers and securities relating thereto, and the value of such estate.

Such inventory shall be signed and sworn to by the assignor or assignors that the same is just and true (*Id.*).

Art. 263. DISCHARGE OF LIABILITY.—A debtor may make such assignment and shall thereupon stand discharged from all further liability to such consenting creditors on account of their respective claims. Such debtor shall not be discharged from liability to such creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor (Acts 1883, p. 46; G. L., Vol. 9, p. 352).

Art. 264. NOTICE OF ASSIGNEE'S APPOINTMENT. —Every assignee shall, within thirty days after the execution of an assignment, give public notice of his appointment in some newspaper printed in the county where the assignor resides or where his principal business was conducted. If no newspaper be printed therein, then such notice shall be published in the newspaper nearest to such place of residence or business. Such notice shall be published for three successive weeks. The assignee shall also give notice by mail to each of the listed creditors of the assignor (Acts 1879, p. 57; G. L., Vol. 8, p. 1357).

Art. 265. ACCEPTANCE OF CREDITORS.—The creditors of the assignor consenting to such assignment shall make their written consent known to the assignee within four months after the notice provided in the preceding article. No creditor not assenting shall receive or take any benefit under the assignment. Any creditor who had no actual notice of such assignment may assent before any

distribution of assets under the assignment. The receipt by a creditor of any portion of his claim from the assignee, shall be conclusive evidence of the assent of such creditor to the assignment (*Id.*).

Art. 266. QUALIFICATIONS AND BOND OF ASSIGNEE.—Every such assignee shall be a resident of this state and of the county in which the assignor resides, or in which his principal business was conducted, and he shall forthwith after the execution and delivery of the assignment, cause the same to be recorded in the county of such assignee's residence and in every county in which there is any real property conveyed to him by such assignment; and shall execute a bond with sureties to be approved by either the judge of the county or district court in the county of the residence of said assignee, in such sum as may be fixed by said judge, conditioned that he will faithfully discharge his duties as such assignee, and that he will make proportional distribution of the net proceeds of the assigned estate among the creditors entitled thereto. Such bond shall be payable to the State of Texas and shall be filed with the county clerk of the county in which such assignee resides, and shall inure to the benefit of the assignor and creditors. Upon filing said bond, the assignee shall take possession of the assigned property and proceed to execute the assignment; and if such assignee shall not within five days after the delivery of the assignment, execute an approved bond and file the same as herein provided, such assignment shall nevertheless take effect as against the assignor and his creditors. It shall be the duty of the county judge or judge of the district court of the county in which the assignee resides, either in term time or vacation, upon the application of the assignor or any creditor, and being satisfied that such bond has not been given, approved and filed, to appoint in writing another competent as-

signee who shall, upon the execution of such bond approved and filed as herein provided, take posession of the assigned property and proceed to execute the assignment. In case of vacancy by death or otherwise, of any assignee, or upon removal of any assignee by the district or county judge for just cause, such judge shall appoint another in his place (Acts 1883, p. 46; *Id.*; G. L., Vol. 8, p. 352).

Art. 267. FRAUD WILL NOT DEFEAT ASSIGNMENT.—No fraudulent act, intent or purpose of the assignor or assignee shall have the effect to defeat the assignment or to deprive the creditors consenting thereto from the benefits thereof; and any consenting creditor may be or become a party to prosecute or defend in any suit or proceeding necessary or proper for the enforcement of his rights under such assignments, or for the protection of his interests in the assigned property (*Id.*).

Art. 268. FRAUDULENT SALE BY ASSIGNOR.—Except as to innocent purchasers for value, all property conveyed or transferred by the assignor previous to and in contemplation of assignment with the intent or design to defeat, delay, or defraud creditors, or give preference to one creditor over another, shall pass to the assignee by the assignment, notwithstanding such transfer; and the assignee, or in case of his neglect or refusal, any creditor or creditors may in his name, upon securing such assignee against cost or liability, sue for, recover and collect the same, and cause the same to be applied for the benefit of creditors as other property belonging to the debtor's estate in the hands of the assignee (Acts 1879, p. 57; G. L., Vol. 8, p. 1357).

Art. 269. PROOF OF CLAIM, ETC.—Every creditor consenting to an assignment shall within six months from the time of the first publication of the notice of the appointment of the assignee,

file with such assignee a distinct statement of the particular nature and amount of his claim against the debtor, which shall be supported by an affidavit of the creditor, his agent or attorney, that the statement is true, that the debt is just and that all proper credits or offsets have been allowed, and the assignee shall allow such claims as a valid claim against the estate unless he has good reason to believe it is not just and true. No creditor shall take any benefit under any assignment who neglects to file such statement within such time. The assignor or any creditor disputing such claim may, within eight months after such first publication, sue to set aside any allowance made by the assignee, and to restrain the payment thereof, and such action shall be tried as in other cases. The assignee shall furnish to any creditor upon request a copy of any statement of a claim that has been filed with such assignee (*Id.*).

Art. 270. DIVIDEND AND ALLOWANCE.—Whenever any assignee shall have in his hands funds sufficient to pay ten per cent of the debts due by the assignor, he shall make a pro rata distribution of the same among said creditors, entitled thereto; and the assignee shall be entitled to reasonable compensation for his services and his necessary costs and expenses, including also, his attorney's fees, to be allowed by the county or district judge (*Id.*).

Art. 271. SURPLUS.—Any creditor not consenting to the assignment may garnishee the assignee for any excess of such estate remaining in his hands after the payment to the consenting creditors (of) the amount of their debts and the costs and expenses of executing the assignment (*Id.*).

Art. 272. EXAMINATION OF ASSIGNOR, ETC.—The judge of the court in which any proceedings shall have been filed may, on the application of the assignee, or of any creditor of the assignor,

or without such application if the judge see fit, at all times require, upon such reasonable notice as the judge may direct, the assignor or any other person to attend and submit to a sworn examination upon all matters relating to the disposition made, or status of the property of the estate assigned, including all transactions in the past bearing upon the rights of the assignee or creditors with respect to the estate in assignment, as contemplated in law. The judge may enforce attendance and obedience to such orders so made by a writ or order as in other cases. Such examination shall be in writing, signed by the persons examined, and attested or sworn to before and filed with the clerk of the court wherein the proceedings are pending, for the use of those interested in the estate. No assignor or debtor shall be prosecuted or punished for any matter or thing disclosed by him on such examination as had above. The costs of such proceedings to be paid out of the estate assigned, or by the application for the examination, as the judge in each case may deem proper (*Id.*).

Art. 273. May Discount Claims.—Claims not due may be allowed at their present value by discounting them at the legal rate. If any creditor holds collateral security of less value than his debt, the value thereof may be estimated by the assignee, and only the difference between such sum and the debt shall be allowed (*Id.*).

Art. 274. Final Report of Assignee.—If any assignee shall desire to be finally discharged, he may make a sworn report of his proceedings under the assignment, showing the moneys and assets that have come into his hands, and how the same

have been disbursed and disposed of. Such report shall thereupon be filed and recorded in the office of the county clerk of the county in which the assignment is recorded. No action shall be brought against such assignee by reason of anything done by him under the assignment as shown by his report, unless the same be brought within twelve months from the time of the filing thereof, as aforesaid; and any moneys or funds on hand shall be deposited in the district court subject to be paid out upon the decree of said court (*Id.*).

3.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statutes 1925 (Assignment for Creditors, Articles 261-274), is valid and that such state law does not conflict with and is not repugnant to Article 1, Section 8, cl. 4, of the Constitution of the United States.

2. The Supreme Court of Texas erred in refusing the application for writ of error and declaring the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statutes 1925, (Assignment for Creditors, Articles 261-274) is valid and thereby holding that such state law does not conflict with and is not repugnant to the National Bankruptcy Act.

3. The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statutes 1925, is valid and is not conflicting with nor repugnant to the National Bankruptcy Act and that the deed of assignment protects the funds in the hands of the assignee from garnishment in a suit timely filed by appellees who are non-assenting creditors and who could not themselves on account of the smallness of their claim and without the cooperation of other creditors, invoke the jurisdiction of the bankruptcy court, although the bankruptcy act was open and available to the insolvent corporation who chose the relief provided under the state law in preference to the relief provided under the federal act.

4. The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct, and that the questions at issue have been definitely settled by the Supreme Court of Texas in the cases of *Patty-Joiner* v. *Cummins*, 93 Tex. 598, and *Hajek* v. *Luck*, 96 Texas 517, and thereby holding in favor of the validity of Title 12, Texas Revised Statutes 1925, and declaring the state law valid and binding both as it relates to the distribution of the property under the assignment and the releases to be given thereunder for the unpaid portion of the debts.

4.

ARGUMENT.

I. Title 12, Texas Revised Civil Statutes 1925, "Assignment for Creditors" Act (Articles 261-274), as applied to this case, is in conflict with and repugnant to Article 1, Section 8, Clause 4, of the Constitution of the United States and the National Bankruptcy Act.

(a) The assignment in question is purely under the Texas Statute and the question of the validity of a common law assignment is not raised.

In the trial court the case was tried upon an agreed statement of facts from which the following is quoted:

> "In compliance with the statutes and ACTING UNDER THE AUTHORITY THEREIN CONFERRED AND PURSUANT THERETO, said Arthur Star, garnishee herein, as such assignee, took possession of all of the assets and property of said corporation and proceeded to convert same into cash" (R. p. 8).

The validity of a common law assignment is therefore not involved and as stated by this Court in *International Shoe Company* v. *Pinkus*, 278 U. S. 261, 49 S. Ct. 108, 110, 73 L. Ed. 318:

> "As all the proceedings were had under the Arkansas Insolvency Law, we need not decide whether, INDEPENDENTLY OF STATUTE, an assignment for the benefit of creditors on the conditions specified in the decree would protect the property of the insolvent from seizure to pay the judgment. And, as the passage of the Bankruptcy Act superseded the state law, at least in so far as

it relates to the DISTRIBUTION of property and RELEASES to be given, plaintiff in error is entitled to have its judgment paid out of the funds in the hands of the receiver.''

(b) Appellants could not themselves, on account of the smallness of their claim and without the cooperation of other creditors, invoke the jurisdiction of the bankruptcy court, and they timely (within four months) proceeded by garnishment against the assignee.

Here, as in International Shoe Company vs. Pinkus, appellants could not themselves on account of the smallness of their claim ($103.08), without the cooperation of other creditors invoke the jurisdiction of the bankruptcy court and in less than four months after the execution of deed of assignment proceeded by garnishment against the assignee, the deed of assignment being executed on March 13, 1931 (R. p. 3), and the garnishment suit being filed on April 9, 1931 (R. p. 5), appellants having refused to accept under the assignment.

(c) This Court has held under such facts that a judgment creditor may proceed in the state court and attach funds in the hands of the trustee or assignee who attempts to hold the funds by virtue of the invalid state insolvency law.

The facts here are in all respects the same as were before this Court in International Shoe Company vs. Pinkus.

This Court in that case stated the issue to be, quoting from that decision:

> "The question is, whether in the absence of proceedings under the Bankruptcy Act, what was done in the Chancery Court protects the property in the hands of the receiver from seizure to pay the judgment held by plaintiff in error."

Here as in the Pinkus case the property was transferred to the assignee pursuant to the state statute imposing conditions to secure the debtor's discharge on compliance with the statute.

Appellants could not invoke the jurisdiction of the bankruptcy court because of the smallness of their claim. Appellants did not, as in *Boese* v. *King*, (108 U. S. 379, 385, S. Ct. 765, 769, 27 L. Ed. 760), wait until the expiration of time allowed for the filing of petition in bankruptcy and then in the state court seek to obtain relief but appellants promptly acted (within the four months period in which bankruptcy could have been filed) and attached the funds in the hands of the assignee, thus creating here the distinction so clearly drawn by this Court between the holding in the Pinkus case and the holding of this Court in Boese vs. King.

(d) The Texas Assignment Act is an insolvency law, providing as a condition for the privilege of sharing in the distribution that the debtor will be discharged by a compliance with the statutory terms and has in it each of the five elements found in the Arkansas Statute and referred to and designated by this Court as obnoxious and repugnant to the Bankruptcy Act.

This Court in declaring the Arkansas Statute an insolvency law referred with approval to the case of Weedman Stave Company, (D. C.) 199 Fed. 948, from which we quote:

> "The elements of an insolvency law are, insolvency, surrender of property, its administration, by receiver or trustee, distribution of the assets among the creditors, and a provision for priority or other matters not permissable in the absence of such a statute. A PROVISION FOR THE DISCHARGE OF THE DEBTOR FROM THE UNPAID BALANCE OF HIS DEBTS IS NOT ESSENTIAL TO MAKE IT AN INSOLVENCY LAW."

Each of these elements are to be found in the Texas Statute.

This Court in the Pinkus decision declared in reference to the Arkansas Statute:

> "It is apparent without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas Statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations."

This Court in the Pinkus case distinctly pointed out five elements in the Arkansas Statute which were declared to be obnoxious and repugnant to the Bankruptcy Act and which would give rise to these inconsistencies and confusion. Quoting from the Pinkus case these five elements of insolvency are:

First: It provides for surrender by insolvent of all his unexempt property to be liquidated by a trustee for the payment of debts under the direction of the Court.

Second: It classifies creditors, prescribes the order of payment of their claims.

Third: And gives preference to those fully discharging the debt in consideration of pro rata distribution.

Fourth: The insolvency of Pinkus was covered by its (the Bankruptcy Act's) provisions, he could have filed a voluntary petition.

Fifth: His application in the state court for the appointment of a receiver was an act of bankruptcy.

Because of these five elements the Arkansas Statute was declared to be an insolvency law, and that it operated within the field occupied by the bankrupt court.

Now, if the Texas Statute contains *each* of these five elements of insolvency, it logically follows that such statute is superseded in so far as it relates to the *distribution* of property and *releases* to be given and appellants are entitled to have their judgment paid out of the funds in the hands of the assignee as declared in the Pinkus case.

Let us compare in detail Title 12, Revised Texas Statutes, with the Arkansas Statute (R. p. 38), in relation to these *five elements of insolvency*, pointed out in the Pinkus case upon which this Court declared the Arkansas Statute superseded.

First: Article 261 of the Texas Statute provides for the surrender of all unexempt property to be administered by the assignee for the payment of the debts. This is done under the supervision and control of the courts, the assignee being required to qualify and file a bond to be approved by the county or district judge. The statute provides for the removal of the assignee. It provides for the examination of the assignor before the county judge, either upon application of a creditor or upon the Court's own motion, and the Court may enforce attendance and obedience. An inventory is required to be filed with the clerk of the Court and a final report must be lodged with the Court, showing in detail all money and property received and how disbursed and the money left on hand is to be deposited with the District Court subject to be paid out under the decree of that Court. These provisions of the Texas Statute are almost identical in their operation with that of the Arkansas law.

Second: The Arkansas law classifies creditors and prescribes the order of payment of their claims. This provision of the Arkansas Statute is under Section 5888, Subdivision 1 (R. p. 39), and merely provides that the salaries of employees earned within three months and all laborers' wages shall be paid first, and afterwards the funds are to be pro rated among the accepting creditors. This Court, in the Pinkus case, in referring to this provision of the Arkansas Statute, said:

> "In pursuance of the statute, the Court ordered the receiver, after the expiration of ninety days, to pay the costs, next salaries earned within

ninety days, and then the claims of those who had duly filed their claims."

This provision of the Arkansas Statute operates *exactly as does the Texas Statute*, as, under the procedure in Texas, the assignee stands, as to the property conveyed, in the place of the assignor, in reference to liens and encumbrances and salaries of employees, taxes, rents, and other liens which are to be paid out of the estate as secured debts (Texas Jurisprudence, Vol. 5, p. 10, Sec. 45, and also Articles 5483 and 7269, Revised Civil Statutes of Texas, 1925, as to liens).

Third: The Texas Statute gives preference to accepting creditors as against nonassenting creditors exactly as does the Arkansas Statute.

Fourth: The insolvency of the Dallas Showcase and Manufacturing Co. was covered by the Bankruptcy Act and the corporation could have filed a voluntary petition in bankruptcy.

Fifth: The making of the assignment was an act of bankruptcy, even without any element of insolvency (*George W. West & Co.* v. *Lea Bros.*, 174 U. S. 590).

As the Texas Statute has, within its terms, and within its operation, each of the five elements of insolvency, that this Court found in the Arkansas Statute, and because of which this Court declared the Arkansas law superseded and suspended, we submit that the Texas Statute is for that reason equally obnoxious and repugnant to both the Bankruptcy Act and the Federal Constitution.

True, the Texas Supreme Court has declared the Texas Statute to be in no sense an insolvency law, but in so declaring, the state court is in apparent conflict with this Court, and this Court is, of course, not bound by the opinion of the state court on that issue. This court, alone, has the power to finally determine that question.

That this Court has definitely overruled the reasoning upon which the Supreme Court of Texas arrived at the conclusion that the Texas Statute is in no sense an insolvency law, is apparent by merely quoting from the decisions themselves, for in *Keating* v. *Vaughn,* 61 Tex. 518, 527, the Texas court held:

> "The statute in question is in no sense an insolvency law providing for the discharge of a debtor by a compliance with its terms, WITHOUT THE CONSENT OF THE CREDITORS, etc. * * *"
>
> "The statutes of this state do not provide for the discharge of a debtor from his liability and obligations to fully pay every debt he contracted UNLESS SUCH DISCHARGE IS CONSENTED TO BY THE CREDITORS."

The same reasoning was urged by the Arkansas Supreme Court in the Pinkus case in its attempt to uphold the validity of its state law, the Court saying (292 S. W. 996):

> "The Arkansas Statute in reference to insolvent debtors, simply authorizes the debtor to go in the chancery court and ask for the appointment of a receiver to take charge of his property and distribute the same among his creditors. * * *"

> "The statute does not prohibit creditors from filing petitions in bankruptcy and DOES NOT REQUIRE THEM TO RELEASE OR RELINQUISH THEIR DEBT OR CLAIM AGAINST THE DEBTOR. They may file their claim and participate in the proceedings or they may decline to do so and still have their judgment or claim against the debtor."

This contention on the part of the Arkansas Supreme Court, this Court distinctly overruled in the Pinkus case and in so doing overruled the very theory upon which the Texas Supreme Court had previously declared that the Texas Statute was in no sense an insolvency law.

The Texas Supreme Court also in an attempt to uphold a state law held that:

> "But is a statute which for the better protection of the creditor prescribes a mode for the administration of the estates of the insolvents under an assignment made by the debtors themselves which would be good at common law UNAIDED BY THE STATUTE, and like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration." *Keating* v. *Vaughn,* 61 Tex. 518, 527.

To the same effect is the opinion of *Hajek & Simicek* v. *Luck,* 96 Tex. 517, 74 S. W. 503, adopted by the Supreme Court as definitely settling the issues here.

It is a coincidence that the Arkansas Supreme Court likewise attempted to sustain the validity of the Arkansas Statute upon this identical theory and

that this Court overruled the contention in the following language, quoting from the Pinkus case:

> "We are of the opinion that the proceedings in the chancery court cannot be given this effect. The enforcement of state insolvency systems WHETHER HELD TO BE IN PURSUANCE OF STATUTORY PROVISIONS OR OTHERWISE WOULD NECESSARILY CONFLICT WITH THE NATIONAL PURPOSE TO HAVE UNIFORM LAWS ON THE SUBJECT OF BANKRUPTCIES THROUGHOUT THE UNITED STATES."

The Arkansas Supreme Court had held that WITHOUT GIVING ANY EFFECT TO THE STATUTE the insolvent by what was done in the chancery court could compel the same distribution and obtain for himself the same advantages as were contemplated by the state statute; in other words the Arkansas Supreme Court held, as did the early Texas decisions, that UNAIDED BY THE STATUTE the procedure was valid and the insolvent could obtain the same advantages as were stipulated in the statute itself. This Court has definitely and decisively overruled this contention in the answer that it gave to the very question in the Pinkus decision.

The history of the assignment laws of Texas is one of insolvency.

This Court in *Cunningham, Assignee,* v. *Wallace,* 125 U. S. 77, 31 L. Ed. 624, had this to say concerning it:

> "The assignment in question was made under a law of the State of Texas, passed on the 24th of

March, 1879, immediately after the repeal of the National Bankruptcy Law, and evidently INTENDED TO TAKE THE PLACE OF THAT LAW."

The original law as enacted, General Laws of Texas, regular session of the 16th Legislature, page 79, reads:

> "That every assignment made by an *insolvent debtor or in contemplation of insolvency,* for the benefit of his creditors shall provide, except as herein otherwise provided, for a distribution of all of his real and personal property."

In view of these express terms, the assignment statute was held to *apply only* to assignments by INSOLVENT PERSONS (Texas Jurisprudence, Vol. 5, p. 74, Sec. 14, footnotes 18 and 19).

The 1925 statutes omit the word "insolvent" and the words "in contemplation of insolvency," but the act still deals and attempts to operate with *insolvent debtors,* seeking a distribution of their assets for the benefit of creditors and seeking discharges from the unpaid portion of their debts.

That a state assignment act is an insolvency law was expressly declared in the Pinkus case from which we quote:

> "In *Boese* v. *King,* 108 U. S. 379, 385, 2 S. Ct. R. 765, 769, 27 L. Ed. 760, this court referring to the effect of the national act upon a *state insolvency law, similar to the Arkansas Statute* under consideration, said, etc."

The state law referred to as being similar to the Arkansas Statute in the above quotation was the New Jersey Statute which was entitled:

> "An Act to Secure to Creditors an Equal and Just Division of the Estates of Debtors Who Convey to Assignees for the Benefit of Creditors."

In another portion of the Pinkus decision is found the following language:

> "The opinion below is not supported by *Boese* v. *King, supra.* In that case there was an *assignment* under the New Jersey *INSOLVENCY LAW.*"

In another portion of the Pinkus decision is found this reference to the New Jersey assignment for the Benefit of Creditors Act:

> "• • • and, as the Bankruptcy Act has superseded the New Jersey INSOLVENCY LAW, etc."

It is true that recovery was not permitted in Boese vs. King, but in the Pinkus case this Court points out the reason in the following language:

> "The receiver was held not entitled to recover *because* the judgment creditors could have secured equal distribution by the institution of bankruptcy proceedings, but instead *they waited* until after the expiration of the time allowed for that purpose, and they by the New York suit sought to obtain preference and full payment."

(e) Intolerable inconsistencies and confusion would result if the state insolvency law be given effect while the national act is in force.

The effort by the state court to give effect to the state law has, in the very opinions referred to by the

Texas Supreme Court as definitely deciding the issues here, created a condition of great confusion and inconsistencies.

For example, in Patty-Joiner and Eubank Company vs. Cummins (reprinted here p. 43) where the creditor refused to enter into the assignment and proceeded to attach or garnishee the funds in the hands of the assignee, it was held that the Assignment for Creditors Act was not suspended by the National Bankruptcy Law *except* the provision for discharge of claims of consenting creditors who were paid as much as one-third.

From that opinion of the State Supreme Court a creditor would naturally assume that that provision of the assignment law discharging the unpaid portion of the debt was unenforceable as being in conflict with the National Bankruptcy Act and being superseded, would not bind an accepting creditor, who *as his only means of sharing in the distribution* of the assets of the insolvent debtor filed his claim with the assignee.

But such is not the effect of that decision for in Hajek and Simicek *et al.* vs. Luck (reprinted here on p. 51), one of the creditors of the insolvent, believing that the provision requiring a discharge was inoperative because of the decision in Patty-Joiner and Eubank vs. Cummins, filed his claim with the assignee and after receiving the statutory one-third, proceeded by suit for the collection of the unpaid portion of the debt. The assignment was a statutory one and the following question was certified to the Texas Supreme Court:

"Were the appellants discharged from further liability on the note, sued on by the facts stated?"

The answer of the Texas Supreme Court is as follows:

> "Therefore we think that the provision of the assignment in this case for a release of the accepting creditors does not require the aid of the statute to give it effect, *and that, even if the statute was sustained by the Bankrupt Act, the* creditors, who accepted and received under it one-third of the amount of their debts *thereby released the remainder.*"

These two decisions, prior holdings of the Texas Supreme Court, are referred to and adopted by the Texas Supreme Court, in the case at bar as deciding the issues here, yet these two decisions are utterly at conflict with each other, and have the direct effect of upholding the Texas statute, including the statutory discharge of the unpaid portion of the debts.

For, in Patty-Joiner & Eubank vs. Cummins, it is held that where a creditor refuses to join in the assignment, the assignment is good as to him, and he cannot interfere with the assignee by attaching or garnisheeing the funds held by such assignee.

And if the creditor accepts under the assignment and he receives the statutory one-third, he suffers a discharge and he may not file suit and obtain judgment for the unpaid portion of the debt, according to the Texas Supreme Court, in Hajek and Simicek *et al.* vs. Luck. By these two decisions the Texas Supreme Court has given full force and effect to the entire statute, including the statutory discharge, for it is an

empty and useless declaration to say, on the one hand, as in Patty-Joiner & Eubank vs. Cummins, that the Texas Statute is valid except the provision for discharge and then to say, in the later decision of Hajek and Simicek *et al.*, vs. Luck, that:

> "Therefore we think that the provision of the assignment in this case for a release of the accepting creditors does not require the aid of the statute to give it effect, *and that, even if the statute was sustained by the Bankrupt Act,* the creditors, who accepted and received under it one-third of the amount of their debts *thereby released the remainder.*"

These holdings of the Texas Supreme Court leave no avenue of escape to the Texas creditor. If he does not accept under the assignment he cannot share in the distribution of the estate, and neither can he attach or garnishee the funds or property in the hands of the assignee. If he does accept under the assignment, he suffers a statutory discharge, whether he wishes to or not. What has occurred in Texas under these decisions illustrates aptly the wisdom of the declaration made by this Court in the Pinkus case when this Court declared that intolerable inconsistencies and confusion would result if the state insolvency law be given effect while the National Act is in force, and these inconsistencies arise in these decisions in the attempt on the part of the state court to uphold the validity of the state law and at the same time recognize the supremacy of the National Bankruptcy Act.

The court below in adopting as correct the opinion of the Dallas Court of Civil Appeals (R. p. ....) refers to the former holdings of this Court in *Mayer* v. *Hellman,* 91 U. S. 496; 23 L. Ed. 377; *Boese* v. *King,* 108 U. S. 379; 27 L. Ed. 760; *Randolph* v. *Scruggs,* 190 U. S. 533; 47 L. Ed. 767; *Stellwagen* v. *Clum,* 245 U. S. 603; 62 Law Ed. 507; and *Straton* v. *New,* 51 Sup. Ct. Rep. 465, 469, as upholding the validity of the state law, but these decisions are not in point and they do not even remotely discuss the issue here.

The case of Straton vs. New is merely a case where the creditors had obtained and docketed judgments constituting liens on the real estate of defendants and had instituted a creditors' suit in a state court to marshal and enforce the lien and sell the real estate subject thereto and the question was certified to this Court—"Does the bankruptcy of defendant, *occurring more than four months* after the institution of creditors' suit oust the state court of jurisdiction and vest in the court of bankruptcy power to enjoin further proceedings in the state court?"

In Mayer vs. Hellman, the trustee in bankruptcy was not permitted to interfere with the assignment because *more than four months* had elapsed, but compare this case with *Pryan* v. *Hernheimer,* 181 U. S. 188, by this Court in which the assignee acquired no title as against the trustee in bankruptcy and where he sold the assets to an innocent purchaser who knew that a petition in bankruptcy had been filed and this sale was made before a trustee was appointed in the bankruptcy court, title did not pass to this innocent

purchaser because these proceedings were had *within the prescribed four months.*

In Boese vs. King, the creditors were not permitted to recover because they waited until after the expiration of the time allowed for the filing of a petition in bankruptcy and for the further reason that they themselves could have filed an involuntary petition without the cooperation of other creditors.

It will be further observed that in Mayer vs. Hellman, and Stellwagen vs. Clum, this Court was dealing with the Ohio Statute which CONTAINED NO PROVISION WHATEVER FOR A DISCHARGE of the insolvent debtor.

The decisions point this out particularly for in Mayer vs. Hellman, this Court said:

> "It does not discharge the insolvent * * * it leaves his after-acquired property liable to his creditors precisely as if no assignment had been made."

And in Stellwagen vs. Clum, this Court declared:

> "Indeed there is not now, any more than when Mayer vs. Hellman was decided, any attempt in the Ohio law to provide a discharge of the debtor from his existing debts."

In the case of Stellwagen vs. Clum it was a question of compensation to be allowed in the bankruptcy court and this Court refused to admit the validity of the assignment in answering the certified questions by declaring that compensation could not be allowed *under the deed of assignment* but it would be allowed

able only for the services that had proven beneficial in the preservation of the estate, the allowance was upon purely equitable grounds and *not under the deed.* This case certainly does not support the decision below.

The court below discusses the case of Randolph vs. Scruggs but seems to have overlooked the important fact that the assignment was made in 1903, that the insolvent was a corporation, and under the bankruptcy law *then* existing was not permitted to file a *voluntary* petition. The assignment in that case therefore did not give the corporation a *choice* of remedies. It was not until 1910 that corporations were permitted to file *voluntary* petitions in bankruptcy. There was no attempt in that case to evade the operation of the bankruptcy law nor to interfere with it and until some creditors filed an involuntary petition, that corporation pursued the only course open to it in the distribution of its property among its creditors.

These cases referred to by the Dallas Court of Civil Appeals (R. p. 13) and adopted as correct by the Texas Supreme Court (R. p. 58) are clearly not in point and do not support the validity of the Texas law.

(f) The national purpose as pronounced by the Constitution and as declared by this Court to establish uniformity necessarily excludes state regulations dealing with insolvency.

This Court has many times referred with approval to the case of *Gutwillig,* 90 Federal 475, from which we quote:

"The object of the Bankruptcy Act is declared to be 'to establish a uniform system of bankruptcy throughout the United States.' The most fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt property among his creditors and to do this by means of the agencies created by the act. That *originally* was its *only purpose.* Later, a second element has been added to the provisions for the bankrupt's discharge, upon such terms and conditions as the acts prescribed. The present act fully prescribes both of these subjects. From the moment an act of Congress establishing a uniform system for the administration of the same assets, whether *originating in the state statute, or in the debtor's common law power to transfer* his property, and regulated, as in this state, by state law, *is necessarily superseded,* provided the Bankruptcy Act is invoked by creditors within the statutory period of limitation. Both systems cannot operate side by side as respects the same estate; the one must necessarily supersede the other; and the state voluntary systems must yield to the system established by Congress pursuant to the Constitution. Voluntary assignments of all of the debtor's property in trust for creditors are just as incompatible with the purposes of the Bankrupt Act as state insolvency systems, and for precisely the same reason; viz., because if allowed to stand as against the trustee in bankruptcy, they defeat the most essential elements of the bankrupt law; namely, the distribution of the debtor's assets in a manner prescribed by the Bankrupt Act and through the agencies to which that act commits them."

It was held in *Gutwillig*, 92 Federal 357, that:

"We entertain no doubt that a voluntary general assignment, with or without preferences, made by an insolvent debtor, within the prescribed

four months, *is fraudulent, and intended by him to 'hinder, delay, and defraud' creditors, within the meaning of the section, because its necessary effect is to defeat the operation of the Bankrupt Act and the rights of the creditors to such an administration of the assets as that act is intended to provide.* The reasons for this conclusion, and the authorities in support of it, are so fully and satisfactorily set forth in the opinion of Judge Brown in the court below that we do not deem it necessary to enlarge upon them. They are summarized in the following extract from his opinion:"

This Court in *Bryan* v. *Hernheimer,* 181 U. S. 188, declared:

> "The general assignment made by Abraham to Davidson did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors. This general assignment was of itself an act of bankruptcy, without regard to the question whether Abraham was insolvent, Bankrupt Act of July 1, 1898, Chap. 541, Sec. 3 (30 Stat. at L. 545); *George M. West Co.* v. *Lea Bros.,* 174 U. S. 590, 43 L. Ed. 1098, 19 Sup. Ct. Rep. 836."

In the case of *Louis Neuburger, Inc.,* 240 Federal 947, it was held that an assignment is properly regarded as potentially a fraud upon the bankruptcy law and upon the creditors.

In the case of *Federal Mail and Express Company,* 233 Federal 691, stated in reference to assignments, that this method of administration involves constant problems as to jurisdiction of the respective courts and in the end secures what many bankrupts desire,

the benefits of both the state insolvency law, and for the creditors, the safeguards of neither.

In the case of *In re Smith,* 92 Fed. 135, it was held that declaring such an assignment an act of bankruptcy amounted to a prohibition of the act and the assignee under the inoperative state law takes no title against the creditors by the deed of assignment and all of the acts touching the estate of the bankrupt as well as all of the acts by the state court in the administration of the bankrupt are unauthorized and void and will be treated as nullities whenever drawn in question.

In the case of *Utley et al.,* 235 Fed. 905, it was held that the main purpose of the bankruptcy law is to secure equality among the creditors in the distribution of the assets, and because of this, it may well be a further policy of the bankruptcy law not to permit any tribunal other than that constituted by the bankruptcy law from thus taking it out of the power of creditors to enforce the payment of their claim.

To give effect to the state law deprives the creditor of the right to have the assets of the insolvent handled through the agencies created by Congress, and gives to the insolvent the right to select those agencies himself, and the creditor is powerless under the decisions of this state, to obtain an adjudication of the insolvent's property, and is also powerless to obtain his pro rata share of the estate without suffering a discharge of the unpaid portion of the debt. *Hajek and Simicek* v. *Luck,* 96 Texas 517, 74 S. W. 305. Instead of the trustee being appointed by the bankruptcy court, the

insolvent himself chooses the assignee, and the creditor may not refuse to accept and proceed by attachment or garnishment. *Patty-Joiner & Eubank Co.* v. *Cummins,* 93 Texas 598, 57 S. W. 566, and the holding of the Court in the case at bar.

Since the decision by this Court in the case of International Shoe Co. vs. Pinkus, the Texarkana, Texas, Court of Civil Appeals has had this issue before it, and declared the Texas Assignment Laws superseded and suspended. This case is reported in 37 S. W. (2d) 776, *Johnson* v. *Chapman Milling Co.,* from which we quote the following:

> "The facts of this case are not materially different from those of *Patty-Joiner & Eubank* v. *Cummins,* (Tex. Civ. Apps.) 59 S. W. 297, *Id.,* 93 Tex. 598, 57 S. W. 566, decided by Texas courts, and *International Shoe Co.* v. *Pinkus,* 173 Ark. 316, 292 S. W. 996, decided by Arkansas courts, where it was held, in effect, that an assignment under a state statute by an insolvent debtor of his property for the benefit of his creditors who accepted thereunder was valid, 'except as against proceedings seasonably taken under the National Bankrupt Act.' In the Pinkus case a writ of error was granted by the United States Supreme Court (278 U. S. 281, 49 S. Ct. 108, 110, 73 L. ed. 318) which reversed the judgment of the Arkansas Supreme Court, holding that in enacting the Bankruptcy Act (11 U. S. C. A. Sec. 1, *et seq.*) 'Congress (quoting) did not intend to give insolvent debtors seeking discharge or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws.' 'States,' the court added, 'may not pass or enforce laws to interfere with or complement the

Bankruptcy Act or to provide additional or auxiliary regulations.'

"It may be, as argued by appellant, that the Texas assignment law (Title 12, R. S. 1925) is not an 'insolvent law' in the sense the Arkansas Statute was, but it cannot be doubted, we think, that the effect of holding it to have been operative in the insolvent debtor's (Beasley's) favor would have been to have given him 'choice between the relief provided by the Bankruptcy Act and that specified' in the Texas Statute, a thing the Federal Supreme Court said should not be done; and, further, would be to 'complement the Bankruptcy Act or to provide additional or auxiliary regulations,' which that court held a state could not do.

"As we view the matter, giving effect, as he was bound to, to the ruling in the Pinkus case the trial court could not have held otherwise than he did, and this court, also bound as it is to respect that ruling, cannot do otherwise than affirm the judgment."

Because of the conflict between the above opinion and the opinion of the Dallas Court of Civil Appeals in the case at bar, the Texas Supreme Court accepted jurisdiction, and overruled the decision of the Texarkana Court of Civil Appeals and declared the opinion of the Dallas Court of Civil Appeals a correct determination of the law, from which decision of the Texas Supreme Court appellants bring error to this Honorable Court.

While we do not consider the question properly raised here as to whether or not an insolvent corporation has the common law power or right to dispose of its assets and that this right is unrestrained and paramount and beyond the control of the Federal Congress acting under the constitutional warrant, still the opin-

ions of the Texas Supreme Court as well as the opinion of the Arkansas Supreme Court, rely upon that alleged common law right or power. If this issue is involved, we submit that Congress has the power to impose reasonable restraint upon this natural right where such reasonable restraint is for the common good.

This power of the government and of the state has been expressly recognized by the Texas courts, for in *Nash Hardware* v. *Morris*, 146 S. W. 876, it was held that:

> "The object of government is to impose that degree of restraint upon human actions which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create private rights. The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them; it involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and natural law: *'Sic utere tuo, ut alienum non laedas.'* The power of the government to impose this restraint is called 'police power.' Tiedman's Lim. of Police Power."

Also in the case of *Owosso Carriage & Sleigh Co.* v. *McIntosh & Warren*, 179 S. W. 257, we find the following:

> "The defendants in error assail the constitutionality of the act. If the act is an unreasonable restraint of the natural rights of the owners of merchandise over their control and use of their property, and their right of contract connected therewith, it should be held unconstitutional; but, if it is merely a proper exercise of the police power

of the state in a wholesome restraint upon the said natural rights for the common good, then the said act would not be repugnant to the organic law. An unreasonable restraint of the natural rights of the owners of merchandise over the control and use of their property, and their right of contract connected therewith, would be intolerable, and violative of rights guaranteed under the Constitution; but a wholesome restraint upon the natural rights of such owners for the common good should be within the police power of the state, and therefore valid."

In the case of *Railway Co.* v. *Dallas*, 85 S. W. 648, it was declared that the legislature may in the exercise of the police power regulate by reasonable requirements the business transactions of its citizens.

Besides, unlike the Texas statutory assignment, at common law, an assignment does not pay the debts, nor does it discharge the assignor from liability for their payment. The indebtedness of the assignor is discharged only to the extent of the actual payment out of the proceeds of the property. *Pillsbury* v. *Kingen*, 33 N. J. Eq. 299; *James* v. *Lederer Strain Co.*, (Wyoming) 233 Pac. 137.

The effect of the decisions of this state arising from the opinion of the Supreme Court in *Hajek and Simicek* v. *Luck*, 96 Texas 517, 74 S. W. 305, is to extend this common law power to the point where it gives the insolvent the right to make an assignment and to impose a condition in such assignment for a discharge for the unpaid portion of the debt, for in that case the assignment was purely statutory, made under the statute, the validity of which is at issue here. The assignment in both Patty-Joiner & Eubank Co. vs. Cummins, and in Hajek and Simicek vs. Luck, were under the Texas Statute, and neither of them were at common law. Yet a creditor may not re-

fuse to accept and attach or garnishee the funds in the hands of the assignee nor may he accept and then proceed by suit to collect the unpaid portion of the debt, under the authority of these two decisions which are declared to have disposed of and settled the issues here presented and to have definitely settled the law of this state on this subject (R. p. 58).

When Congress enacted the bankruptcy law, it proceeded under a grant of power expressly given to it by the Federal Constitution, Article 1, Section 8, Clause 4. That power given to Congress by the Constitution is unrestricted and paramount, and it cannot be doubted that in the national purpose to establish uniformity, Congress had the power to impose that degree of restraint upon natural rights that would carry out the constitutional purpose.

If an insolvent may, by assignment, require the creditors to accept thereunder, and give such insolvent a discharge or if he may, by such assignment, so divest himself of title as to place his estate beyond the reach of his creditors, he has been given the power to enact a bankruptcy law of his own, and to proceed with the disposition of his estate in utter disregard of the National Bankruptcy Act. That an insolvent may not thus create his own bankruptcy law and thus destroy the national purpose of requiring uniformity in bankruptcy matters, hardly needs a presentation of argument. The question answers itself, in the negative.

CONCLUSION.

This Court, in the Pinkus decision, declared: "The purpose to exclude state action for the discharge of insolvent debtors may be manifest without specific declaration to that end." And that the power of

Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. The Texas Statute contains a provision for the discharge of the insolvent who makes an assignment under the state act. Under the decisions in Texas, one who refuses to accept under the assignment because he does not desire to discharge the unpaid portion of the debt, is bound by the assignment to the extent that he may not garnishee or attach the funds or property in the hands of the assignee, according to the decision below. In other words, the assignment is not good only between the insolvent and the accepting creditors, but is good as to all of the creditors, in that, as a condition precedent to the privilege of sharing in the proceeds derived from the insolvent's estate, the creditor must necessarily agree to the stipulation for the discharge of the unpaid portion of the debt upon compliance with the statutory provisions.

The provision for discharge is equally binding upon those who, although objecting to the discharge, accept under the assignment, for such creditors are not permitted to sue and recover judgment for the unpaid portion. *Hajek & Simicek* v. *Luck*, 96 Texas 517, 74 S. W. 305 (reprinted here on p. 51).

While the amount involved in this appeal is insignificant, the judgment of this Court will have a far-reaching effect. The supremacy of the Bankruptcy Act is here clearly at issue, as against a state insolvency law. There is no more active competitor of the Bankruptcy Act in the field of insolvency than general assignments for the benefit of creditors, and whether these assignments are made under the authority of some state law or at common law, they create the same inconsistencies and confusion, and

involve the same constant problems of jurisdiction of the respective courts, and in the end they secure to the bankrupt all of those special benefits arising from the selection of his own assignee, and the management of the estate through the agencies that he himself has chosen, and denies to the creditors those safeguards intended that the creditors should have under the bankruptcy proceeding.

We respectfully submit that one who has the privilege of becoming a bankrupt under the Bankruptcy Act, cannot ignore the privileges of that law and become a voluntary bankrupt or a voluntary insolvent under a state law, and thereby deprive non-assenting creditors of the right expressly given by Congress, to have the estate of the insolvent administered under the supervision of the bankruptcy court and through a trustee therein.

On July 12, 1932, the Supreme Court of Washington in the case of *Tacoma Grocery Company* v. *G. L. Doersch,* reported in 12 Pacific (2d) 929 and 21 A. B. R. (N. S.) 472, held that an assignment for the benefit of creditors, made under the state statute, did not prevent creditors, not properly filing claim, from seizing debtor's property to pay judgment, since the statute was superseded by the bankruptcy act, following the decision of this Court in International Shoe Company vs. Pinkus.

But this Court has already declared, in the Pinkus case, that Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act, and that specified in state insolvency laws, and states may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations.

This Court stated further, in the Pinkus case, that the enforcement of state insolvency systems, whether held to be in pursuance of statutory provisions *or otherwise*, would necessarily conflict with the national purpose to have uniform laws on the subject of bankruptcy throughout the United States.

If the distribution among the creditors of the property of insolvent debtors is committed *exclusively to the courts of bankruptcy* appointed by such law, then we have a uniform system by which such distribution may be effected, but until the bankruptcy court is declared to have such *exclusive* power to distribute the assets of insolvent debtors, there can be no uniform system of insolvency in the United States. As long as state systems remain operative, and under such state laws the distribution of insolvent assets is attempted, then the constitutional purpose is destroyed, and these state systems constitute a continual infringement upon the requirement of uniformity in these matters.

The element of discharge in an insolvency system is of minor consequence, as the primary object of the bankruptcy law is to safeguard the distribution of insolvents' estates through the agencies created by the act. True, the discharge is an advantageous feature to the insolvent, but when one views the Bankruptcy Act from the standpoint of the creditor, his primary interest lies in the handling of the insolvent's estate through those agencies created by Congress, looking toward a uniform system by which these estates may be distributed, and to deprive the insolvent of selecting for himself a private system by which these distributions might be effected, and the privileges of the Bankruptcy Act ignored. Surely it will not be held that the element of discharge is the vitally essential point in a conflict between the national and state insolvency

laws. To establish a uniform system for the *distribution* of insolvents' estates, was originally the *only purpose* of the Bankruptcy Law. The element of discharge was placed in the act *later*. We therefore submit that, independent of any question in the Texas Statute in regard to a discharge of the insolvent, the statute creates an infringement upon the constitutional purpose of having a uniform system for the *distribution* of these estates, among the creditors. The rights of the creditors to have the distribution made through the agencies created by Congress, we submit is of paramount importance. This right does not exist where an insolvent is permitted to make an assignment for the benefit of his creditors, and to bind the creditors thereby.

There is now, and always will be continual warfare between these two systems of handling the estates of insolvent debtors. For this reason the opinion of this Court, in this case, will go far toward safeguarding that uniformity which has by this Court been declared to be the constitutional purpose.

We respectfully submit that the judgment of the court below should be reversed, and appellants should be permitted to enforce the collection of their judgment against the funds in the hands of the assignee, as was declared by this Court in the Pinkus decision, and that Title 12, Revised Civil Statutes of Texas be declared superseded and suspended by the National Bankruptcy Act.

Respectfully submitted,

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Spearman Webb

APPENDIX.

Patty-Joiner & Eubank Co. v. *Cummins,*

Supreme Court of Texas,

June 11, 1900,

57 S. W. 566.

GAINES, C. J. This case comes to us upon certified questions. The statement and questions as certified are as follows:

"The above-entitled cause is an appeal from a judgment of the county court of Hunt County. On Febuary 2, 1899, W. S. Bedford & Son executed a general assignment conveying all their property subject to execution to R. B. Cummins, for the benefit of all their creditors who would agree to accept under the same and release them. The assignment was in the usual form, and was a statutory assignment as provided by the statutes of the state of Texas. Attached to the assignment was a list of the creditors and a schedule of the assets of the assignors. The assignee accepted the trust and proceeded to administer the property. Patty-Joiner & Eubank Company, a creditor of the assignor's, did not accept under the assignment, but sued and obtained a judgment against W. S. Bedford & Son, and on March 9, 1899, pending the suit, sued out a writ of garnishment against R. B. Cummins, the assignee of W. S. Bedford & Son. The assignee answered the writ of garnishment; denying that he

was indebted to, or had any effects in his hands belonging to W. S. Bedford & Son, or that he knew of any person so indebted, or in possession of effects. Patty-Joiner & Eubank Company controverted the answer, alleging the making of the assignment, and that the garnishee had more than sufficient funds, proceeds of the assigned property, to pay their debt, and further alleging that the national bankruptcy act was in force at the time the assignment was made, and contending that the passage of the act suspended the statutory assignment law of the state of Texas, and that R. B. Cummins, the garnishee, who was the assignee under the assignment, was liable under the garnishment for the funds that were in his hands, proceeds of the assigned property, to the extent of the judgment obtained by the Patty-Joiner & Eubank Company against the said W. S. Bedford & Son. On the trial it was proved that the garnishee had property and money, the proceeds of said assigned property, in his hands, which would be subject to garnishment if it should be held that the assignment was invalid. The court below held that the passage of the bankrupt act did not suspend the state assignment law, so as to render the assignment invalid, and that it would only have the effect to set aside the assignment upon the institution of bankruptcy proceeding against the assignors, and rendered judgment discharging the garnishee. This court affirmed the judgment of the court below. Pending a motion for rehearing, this court desiring the instruction of the Honorable Supreme Court for the proper decision of an issue of law arising upon

the record, it is ordered that the following questions be certified to the Supreme Court of Texas, in accordance with Article 1043, Rev. St., to-wit:

'(1) Was the state assignment law of Texas suspended by the passage and going into effect of the national bankruptcy act? And, if so, is the money in the hands of the assignee, Cummins, subject to the garnishment of the Patty-Joiner & Eubank Company, the creditor of the assignors, W. S. Bedford & Son?

(2) By reason of the facts stated, was the assignment invalid?'

But for the fact that the assignors in the deed of assignment in question availed themselves of the privilege conferred by that provision of our assignment law which authorized them to exact discharges of the accepting creditors, provided they should receive from the assigned estate as much as one-third of their respective debts (Rev. St. Art. 73), there would be no difficulty in determining the question. The assignment, being of all the debtors' property, and being for the equal benefit of all the creditors of the assignors, would undoubtedly have been good as a common-law conveyance, even if it should be held that the effect of the passage of the United States bankrupt act of 1898 was to wholly suspend the operation of our statutes which provide for general assignments by insolvent debtors. In *Mayer* v. *Hellman*, 101 U. S. 496, 23 L. Ed. 377, it was held that such an assignment under the laws of Ohio was good, even as against an assignee in bankruptcy, when executed six months

before proceedings in bankruptcy were taken against the debtor; and that decision would be conclusive of the question certified but for the fact that the law of Ohio did not provide for the discharge of the assignors. That case arose under the bankrupt law of 1867, and, while there is a difference between that act and the now existing law, that difference is immaterial, in so far as it affects the question before us. The present law expressly declares the making of a general assignment for the benefit of creditors an act of bankruptcy. It was an act of bankruptcy under the former statute, as held by the courts (*Boese* v. *King,* 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760) there being, however, no express declaration to that effect in the act itself. Under the former law, a proceeding to have a debtor who has made a general assignment declared a bankrupt had to be executed within six months. The period is reduced to four months by the present act. If, then, the assignment under consideration was good at common law, it is a good assignment in this proceeding, and was from its inception good for all purposes, except against proceedings in bankruptcy instituted under the bankrupt act of 1898 within four months from the day of its execution. The only doubtful feature of the instrument is the provision which exacts releases, and the question is, does that make the assignment void at common law? There is a conflict of authority upon the question, and, so far as we have been able to discover, there has been no authoritative decision by this court upon the point. The accepted rule in England seems to be that, if the assignment

conveys all the debtor's property, to exact a release as a condition of participating in its benefits does not make it void. *Rex* v. *Watson*, 3 Price 6; *Janes* v. *Whitebread*, 5 Eng. Law & Eq. 431; *Jackson* v. *Lomas*, 4 Term R. 166. The rule seems to us a logical deduction from that other rule of the common law, that a debtor has the absolute right to prefer his creditors, and to appropriate all his property to pay one or more of them, to the exclusion of all others, provided that in no case more property be applied to the payment of a debt than is reasonably sufficient to satisfy it. The failing debtor may also appropriate any or all of his property to the securing of one or more of his creditors, provided the surplus be left subject to legal process in behalf of those who are unsecured. Since the debtor may directly appropriate his property to satisfy or secure any one or more of his debts, leaving others unsatisfied and unsecured, we fail to see how a creditor is injured by an assignment which exacts releases from those who accept under it. If the assignor could have preferred those who may see fit to accept, by transferring his property to satisfy or secure their debts, without making any provision whatever for his other creditors, how can the creditor who declines to accept such a deed of assignment complain, when the assignor may accomplish the same result by a mortgage in which the beneficiaries are expressly named? If it be urged that it is rigorous and unjust to a creditor to force him to release the debtor as a condition of his participation in the proceeds of the assigned estate, the answer is that he is

not compelled to accept, and that, if he declines to do so, he is in no worse position than if the debtor had directly applied the property to the payment or the securing of debts of those who may accept. That they are required to release does not affect him injuriously. It rather inures to his benefit. In so far as debts are discharged by releases, the volume of the indebtedness of the assignor is diminished to the extent of the debts so released, and this is clearly to the advantage of the remaining creditors, since it increases their chance of securing their claims from the future acquisitions of the assignor. But we may go further. That a bankrupt law of the United States does not necessarily render an assignment made under a state insolvent law invalid for every purpose is established by the decision of the Supreme Court of the United States in the case of *Boese* v. *King*, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760. In that case, while the bankrupt act of 1867 was in force, an assignment was made in New Jersey under the statute of that state which provided for the discharge of the assignor from the debts of all accepting creditors. Certain creditors of the assignor, who did not accept under the assignment, procured a judgment in the state of New York against him; and an execution thereon having been returned unsatisfied, a receiver of the property of the execution debtors was appointed. The receiver, having obtained authority from the court to sue the assignees, brought suit against them to test the validity of the assignment, and to subject certain property of the debtor in the latter state to the payment of the judg-

ment. It was held that the making of the assignment was an act of bankruptcy; that the instrument was subject to be attacked and avoided by proper proceedings in the bankrupt court at any time within six months after it was executed, but that it was otherwise a valid conveyance of the property, although it might be that the provisions of the New Jersey statute for the distribution of the proceeds of the assigned property among, and the discharge of, the accepting creditors, were not enforceable, by reason of the bankrupt act. In their opinion the court say: 'If it should be assumed, for the purposes of this case, that the statute of New Jersey was, as to each and all of its provisions, suspended when the bankrupt act of 1867 was passed, it does not follow that the assignment by Locke was ineffectual for every purpose. Certainly, that instrument was sufficient to pass the title from Locke to his assignees. It was good as between them, at least, until Locke, in some appropriate mode or by some proper proceedings, manifested a right to have it set aside or canceled upon the ground of a mutual mistake, in supposing that the local statute of 1846 was inoperative. And in the absence of proceedings in the bankruptcy court impeaching the assignment, and so long as Locke did not object, the assignees had authority to sell the property and distribute the proceeds among all the creditors; disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds to conform to the local statute. The assignment was not void as between the debtor and the assignees simply because it provided

for the distribution of the proceeds of the property in pursuance of a statute, none of the provisions of which it is claimed were then in force.' Four of the judges dissented from the conclusion of the majority in that case, but the effect of the bankrupt act upon a state insolvent law is a federal question, and therefore the decision of the court has a controlling effect upon us. The effect of the ruling is that, in so far, at least, as an insolvent law of a state provides for a release by the creditors, it is suspended by a bankrupt law of the United States, but that if the assignment convey all the debtor's property, subject to the payment of his debts, for the equal benefit of all his creditors who may accept under it, it is otherwise valid, except as against proceedings seasonably taken under the bankrupt act. This answers both questions."

Hajek & Simicek et al. v. *Luck,*

Supreme Court of Texas,

May 18, 1903,

74 S. W. 305.

GAINES, C. J. The following question has been certified for our decision:

"This was an action brought by the appellee in the court below to recover of the appellants, as the makers of a certain promissory note, a balance due thereon, after deducting a credit of more than 33 1/3%, received by the appellee, an accepting creditor, from the assignee of Hajek & Simicek in a general assignment made by them, in accordance with the stat-

ute of this state, for the benefit of such of their creditors as would accept the assignment and discharge them from further liability. The assignment was made subsequent to the passage of the national bankrupt act of July 1, 1898, 30 Stat. 544, c. 541 (U. S. Comp. St. 1901, p. 3418). The appellants Hajek & Simicek were partners, and joined in the assignment which was made by them. They were principals in the note, and the appellant John Hajek was their surety. No steps were ever taken to adjudicate them as bankrupts. The assignment was made more than four months before the bringing of this suit, and has been closed, leaving a balance due on the note sued on, for which the court below rendered judgment in favor of the appellee. This court being of the opinion that the case of *Patty-Joiner & Eubank Co.* v. *Cummins,* 93 Tex. 598, 57 S. W. 566, is not decisive of the question here presented, and desiring the instruction of the Honorable Supreme Court upon the question of law presented by these facts, respectfully certify the following question for its decision:

'Were the appellants discharged from further liability on the note sued on by the facts stated? Should the judgment in favor of the appellee be affirmed?'

The case of *Patty-Joiner & Eubank Co.* v. *Cummins,* 93 Tex. 598, 57 S. W. 566, referred to in the certificate, determines two questions: First, that an assignment made under the assignment law of this state which does not exact releases, though subject

to be set aside by proceedings in bankruptcy, seasonably instituted, was not otherwise void; and, second, that even such an assignment, which is made for the benefit of such creditors only as should accept under it and release the assignor from further liability, operated a transfer of the property, and that it was not subject in the hands of the assignee to a writ of garnishment by a nonaccepting creditor. But the question now presented, that is to say, whether the debt of a creditor who has accepted under an assignment of the latter class, and who has received under it 33 1/3% of his debt, is thereby released, was not involved in that case, and therefore not certified to us by the Court of Civil Appeals. As a matter of course we did not decide it. We did intimate, however, that the effect of the ruling of the Supreme Court of the United States in *Boese* v. *King,* 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760, is that, in so far as a general assignment law of a state provides for a release by the accepting creditors of an insolvent assignor, it is an insolvent law; that is to say, such a law as it suspended by a general bankrupt act of the United States. But in *Keating* v. *Vaughn,* 61 Tex. 524, it is said that: 'The statute in question is in no sense an insolvent law, providing for the discharge of a debtor by a compliance with its terms without the consent of the creditor, but is a statute which, for the better protection of creditors, prescribes a mode for the administration of the estates of insolvents under assignments made by the debtors themselves, which would be good at common law, un-

aided by the statute, and, like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration.'

But if it should be held that our statute, in so far as it makes provision for exacting releases, is an insolvent law, and therefore suspended by the bankrupt act of the United States, it does not determine the question now under consideration. We see no good reason why the assignment made in pursuance of the statute was not good, at least as a common law assignment. Nor do we see why, even if not subject to the regulations of the assignment law, the assignee could not take possession of the property, dispose of it, and divide the proceeds among the accepting creditors. Boese vs. King, above cited. The assignment would have been annulled by a proceeding in bankruptcy instituted within four months from the time of its execution. But no steps having been taken under the bankrupt act, no good reason suggests itself to our minds why any provision of the instrument valid at common law should not be given effect. That at common law an assignment is valid which provides for a discharge by the accepting creditors, is the opinion expressed by this court in the case of Patty-Joiner & Eubanks Co. vs. Cummins, above cited. The grounds for the conclusion are there stated, and need not be here repeated. Whether the determination of the point was necessary to the decision of that case, we need not now inquire. We are still of that opinion. Therefore we think that the provision of the assignment in this case for a

release as to the accepting creditors does not require the aid of the statute to give it effect, and that, even if the statute was suspended by the bankrupt law, the creditors, who accepted and received under one-third of the amount of their debts, thereby released the remainder.

We answer that the appellants were discharged on the note sued on by reason of the facts stated in the certificate, and that the judgment in favor of appellee should be reversed."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 282.

HELEN C. JOHNSON, HERBERT F. JOHNSON, JR., HENRIETTA J. LOUIS, AND JOHN J. LOUIS, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF S. C. JOHNSON & SON, APPELLANTS,

VS.

ARTHUR STAR, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS.

SUPPLEMENTAL BRIEF OF APPELLANTS CHALLENGING BRIEF OF APPELLEE AS MISQUOTING RECORD.

SPEARMAN WEBB,
Attorney for Appellants.

SUBJECT INDEX

Appellants challenge brief of appellee as misquoting the record—

That the following statement of facts in appellee's brief conflicts with the record, the statement being that no acceptance by the creditors was required 2

That the following statement of facts in appellee's brief conflicts with the record, the statement being that no discharge was sought by assignee or assignor and that no release of future liability was ever requested of appellants 3

That the following statement of facts in appellee's brief conflicts with the record, the statement being that $582.63, the funds in the assignee's hands, are to be applied on $11,000 of indebtedness, or less than four per centum to each creditor 4

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The following statement of facts set out in appellee's brief under his statement of the case on pages 2 and 3 thereof, are challenged as incorrect, not supported by

the record, and in direct conflict therewith. These statements by appellee, which are here challenged are:

1. That no acceptance by the creditors was required (Appellee's Brief, p. 1).
2. That no discharge was sought by assignee or assignor and that no release of future liability was ever requested of appellants (Appellee's Brief, p. 2).
3. That $582.63, the funds in the assignee's hands, are to be applied on $11,000 of indebtedness, or less than four per centum to each creditor (Appellee's Brief, p. 2).

1.

The statement that no acceptance by the creditors was required is in conflict with this record, as the assignment was purely statutory, and so admitted in the agreed statement of facts, which reads in part, as follows:

> "In compliance with the statutes and acting under the authority therein conferred, and pursuant thereto, said Arthur Star, garnishee herein, as such assignee took possession of all the assets and property of said corporation, etc." (R. p. 8).

That the assignment was under the provisions of the statute and controlled thereby, is shown in the record by the trial court's "Findings of Fact" (R. p. 10), from which the following is quoted:

> "• • • which deed of assignment is in compliance with Title 12, of the 1925 Revised Civil Statutes of Texas, etc."

And the assignment was so considered by the trial court in his conclusions of law (R. p. 11), in which the

issues of law were determined purely on the question of validity of Title 12 of the Texas statutes. The assignment was considered purely statutory by the Texas Court of Civil Appeals in its opinion (R. p. 13) in which that court declared in its opening words:

> "The question for decision is whether the 'Assignment for Creditors' Act, Title 12, R. S. 1925, was suspended by the National Bankruptcy Act, etc."

The Supreme Court of Texas considered the assignment purely statutory and so dealt with it in its opinion (R. p. 58).

Being purely statutory, by force of the statute itself, the acceptance of creditors was not only requested, but as a matter of law, required. Article 265 of the statute, printed in appellants' brief on page 6, provides in part as follows:

> "No creditor not assenting shall receive or take any benefit from the assignment."

2.

Equally conflicting and equally unsupported by the record is the statement that no discharge was sought by assignee or assignor, and that no release of future liability was ever requested of appellants. Appellee refers to no portion of the record in support of his statement of facts. As set out in paragraph 1 of this brief, this is a statutory assignment, and all the acts of the assignee were under the statutory authority, and regulations. This is admitted in every part of the

record from the beginning to the end, except in appellee's brief.

The assignment being statutory and controlled by the statutory regulations, the judgment debtor was seeking a discharge and such discharge was by force of the statute imposed upon accepting creditors, as Article 263 of the statute printed on page 6 of appellants' brief reads as follows:

> "DISCHARGE OF LIABILITY.—A debtor may make such assignment and shall thereupon stand discharged from all further liability to such consenting creditors on account of their respective claims. Such debtor shall not be discharged from liability to such creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor."

This statutory discharge is not dependent upon a *request* by the judgment debtor, but is imposed arbitrarily by the statute, and enforced by the decisions in the State of Texas, as set out in appellants' original brief.

3.

The statement by appellee that the funds in the hands of the assignee are to be applied on $11,000 of indebtedness or less than 4 per centum to each creditor, is misleading, and not supported by the record.

It is quite true that in the trial court's "Findings of Fact" (R. p. 10) the court declared that:

> "The amount of unsecured indebtedness of the Dallas Showcase and Manufacturing Company

> at the time of such deed and assignment, was approximately $11,000.00,"

but this statement does not support appellee's declaration that the funds were to be distributed to the *unsecured creditors,* amounting to that sum.

No unsecured creditor is entitled to share in that distribution unless he has *assented* to the assignment.

Article 265 of the statute, printed in appellants' brief on page 6, in part declares:

> "No creditor not assenting shall receive or take any benefit under the assignment."

In order to determine the amount of the claims entitled to share in the distribution, it must be determined the number of *assenting* creditors, and the aggregate amount of *their* claims. There is not one line in this record showing that any creditors have accepted under the assignment, and as stated in our original brief, it is therefore not made to appear in the record whether the statutory discharge of the unpaid portion of the debts would be effective, and appellants *would necessarily have to consent* to the statutory provision discharging the unpaid portion *in the event* the necessary one-third was eventually paid.

Besides this, it is not shown by this record that appellants knew either of the amount of funds on hand by the assignee or the amount of the indebtedness of the judgment creditor at the time the suit was filed, on April 9, 1931 (R. p. 1). These facts developed, if they did develop at all, on June 4, 1931, sixty days after

the filing of this suit (R. p. 7). Appellants' position is to be judged, not by the *later developments,* in the litigation, but by the facts in their possession when they were called upon either to accept under the assignment or to decline to do so, and they should not be required to speculate as to what may possibly develop under the administration by the assignee.

The trial court's "Findings of Fact" (R. p. 10) have no proper place in this record, and do not bind anyone for the reason that this case was tried upon an agreed statement of facts (R. p. 7), in which appellee agreed in writing that:

> "Upon the foregoing facts, together with garnishee's original answer and a transcript of the justice court record, this case is submitted to this court for judgment" (R. p. 8).

There being no *issue of fact* before the court, it was not within the province of the court to *find* facts, and certainly the court would have no power to find facts which were not before him. But appellants have no quarrel with the record on that score, and even though the statement made by the trial court be superfluous and unsupported by the agreed facts, we deem the circumstance of no consequence, because we do not believe that this court should be called upon to deal with presumptions of fact at this time, nor to presume or undertake to speculate on the number of creditors *who may accept* and the probable aggregate sum of *their* claims, in order to determine whether or not the statutory discharge will become effective. It is sufficient that ap-

pellants should not be required to accept under the assignment with this *uncertainty*, and that they not be required to presume or speculate upon these later developed facts. If $1,500.00 of claims were filed by assenting creditors, more than the statutory one-third would be paid, and the discharge become fully effective, and for aught that appears in this record, this question is as open now and subject to just as much speculation as it was at the trial in the court below, and when appellant was called upon to either accept under the assignment or challenge it.

These statements of facts set out in appellee's brief, would seem to create the impression that the assignment was not statutory and it was merely a case of turning over the assets to be distributed among the creditors, share and share alike, calling for no acceptance on the part of the creditors, and seeking no discharge and that this distribution would be made to all creditors, irrespective of that provision of Article 265, requiring that no creditor not assenting shall receive or take any benefit under the assignment.

Such an interpretation of the facts in this case is so in conflict with the record that appellant feels called upon to challenge these statements as misleading, and unsupported by the record.

Appellants rest their case upon the facts *shown by this record*, and in their brief they have attempted to set out these facts correctly, and impartially, and they regret the necessity of challenging appellee's statements.

Respectfully submitted,

SPEARMAN WEBB,
Sherman, Texas,
Attorney for the Appellants.

Spearman Webb

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IN THE

Supreme Court of the United States

October Term, 1932

No. 282

HELEN C. JOHNSON, HERBERT F. JOHNSON, JR., HENRIETTA J. JOHNSON AND JOHN J. LOUIS, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF S. C. JOHNSON & SON,

Appellants,

vs.

ARTHUR STAR,

Appellee.

On Appeal From the Supreme Court of the State of Texas.

BRIEF FOR APPELLEE

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IN THE

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October Term, 1932

No. 282

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Appellants,

vs.

ARTHUR STAR,

Appellee.

On Appeal From the Supreme Court of the State of Texas.

BRIEF FOR APPELLEE

1.

THE OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Texas is printed in the record, at page 58, and reported in 47 S. W. (2nd)

608. The opinion of the Court of Civil Appeals, affirmed by the Supreme Court of Texas, is printed in the record at page 13, and reported in 44 S. W. (2nd) 429.

2.

STATEMENT OF THE CASE

This is an appeal from the Supreme Court of the State of Texas, affirming a judgment of one of the Courts of Civil Appeals, holding that the law of Texas regulating assignments for the benefit of creditors, known as Title 12 of the 1925 Revised Civil Statutes, was not suspended by the National Bankruptcy Act, that the assignment from Dallas Showcase and Manufacturing Company to appellee was valid to pass title to all its assets to appellee, and that such assets were thereby removed from the reach of garnishment by appellants on a claim against the assignor.

The findings of fact by the trial court, show, at page 10 of the Record, were not disturbed by the Court of Civil Appeals or the Supreme Court, and are binding as a statement of all the facts involved in the case.

These findings of fact show conclusively that the assignment in this case was for the benefit of all creditors, share and share alike, no acceptance by the creditors being required. They show that no discharge was sought

by the assignee or the assignor, and that no release of future liability was ever requested of appellants. They show that $582.63 in the assignee's hands is to be applied on $11,000.00 of indebtedness, or less than four per centum to each creditor. They show that the assignee acted thruout under the authority of the deed of assignment as made to him.

The trial courts held that Title 12 of the 1925 Revised Civil Statutes was suspended, that the assignment therefore could not pass title, and that accordingly funds held by the assignee were subject to garnishment by a creditor of the assignor. This entire holding was reversed by the Court of Civil Appeals and the Court of Civil Appeals was sustained by the Supreme Court of Texas.

The questions for review in this court are:

(1) Is a law regulating assignments for the benefit of creditors, construed by the Supreme Court of that state not to be an insolvency law, suspended by the National Bankruptcy Act?

(2) Is an assignment for the benefit of all creditors, which would be good at common law, and which contains no provision for release or discharge, absolutely void to pass title, in the absence of any proceedings under the National Bankruptcy Act?

The facts of this case do not in any way involve the

question of discharge or release either by provisions of the assignment or by statutory provisions; nor has such question ever been raised in the facts, being raised only by appellants' brief perhaps as a smoke-screen.

3.

ARGUMENT

(1) Title 12 of the 1925 Revised Civil Statutes of Texas, construed to be an assignment law by the Supreme Court of Texas, is not an insolvency law, and in no wise conflicts either with the Constitution of the United States or with the National Bankruptcy Act of 1898.

These are not new questions before this honorable Court. Ever since passage of the Bankruptcy Law of 1800, assignments for the benefit of creditors have been assailed as void. Never has this court held an assignment for the benefit of creditors absolutely void ab initio, although it is not disputed that assignments are voidable when attacked by bankruptcy proceedings seasonably begun, within four months under the present bankruptcy law. This Court has consistently and carefully differentiated between insolvency laws and assignment laws, and two long lines of decisions have grown

up under these two headings, lines which have been differentiated and followed by the lower federal courts and by the state courts thruout the nation.

Appellants' case is based on International Shoe Company vs. Pinkus, decided by this court in 1928, reported in 278 U. S. 261, 73 L. Ed. 318. The Pinkus case laid down no new principle of law, but merely enunciated the doctrines set forth by this Court on numerous occasions, and capped the climax of the line of decisions under the heading of insolvency laws. It is a clear statement of the rule of law *applying to its facts.* Its facts are that in Arkansas there are two statutes, one known as Chapter 93 of Crawford & Moses' Digest, entitled "Insolvent Debtors", set out in the Record, page 38; the other known as Chapter 9 of Crawford & Moses' Digest, entitled "Assignments for Creditors." Upon the first of these laws this court passed in the Pinkus case, holding it to have been suspended by the Bankruptcy Law, and this court opened its discussion with the statement:

> "The Arkansas Statute is an insolvent law. It is so designated in its title, Arkansas Acts of 1897, and in the revision. *The Supreme Court of the State treats it as such.* (Citing decisions of Arkansas Supreme Court so holding.)

The only question before this court for decision in that case was the Arkansas Insolvency Law. No question of

assignments for the benefit of creditors was involved in it. And this court handed down the same decision that it had rendered time and time again, ever since the days of Sturgis vs. Crowninshield, 4 Wheat 122, 4 L. Ed. 529, which held insolvency laws suspended insofar as they conflicted with the United States Bankruptcy Law.

The Arkansas Supreme Court has itself differentiated between Chapter 93, "Insolvent Debtors", and Chapter 9, "Assignments for Creditors" in the case of Finch vs. Watson Investment Company, 42 S. W. (2nd) 214. In that case that court held that the Pinkus case applied to actions under Chapter 93, which chapter was suspended, but that it did not apply to or affect in any way the validity of assignments for the benefit of creditors under Chapter 9, regulating the administrative procedure in cases where an assignment was voluntarily made by a debtor.

But appellants seek to make the Pinkus case controlling of a different set of facts, to which this court has often applied a different rule of law. If Appellants' contention is correct that an assignment for the benefit of creditors is void, and conveys no title, then this court has been wrong for fifty years. For fifty years this court has regularly, consistently, and steadily recognized the validity of an assignment for the benefit of creditors, and has never overthrown one *unless proceedings*

in bankruptcy were properly begun in due time. No bankruptcy proceedings have ever been initiated in the instant case.

In 1833 Mr. Chief Justice Marshall in Brashear vs. West, 7 Peters 608, 8 L. Ed. 801, said:

> "That a general assignment of all a man's property is, per se, fraudulent, has never been alleged in this country. The right to make it results from that absolute ownership which every man claims over that which is his own."

Without interruption, this court has recognized that doctrine, either expressly holding assignments valid, unless attacked in bankruptcy in due time, as in Mayer vs. Hellman, 91 U. S. 496, 23 L. Ed. 377, and Stellwagen vs. Clum, 245 U. S. 605, 62 L. Ed. 507, or impliedly so holding by recognizing the adverse claim of assignees to fees, as in Louisville Trust Company vs. Comingor, 184 U. S. 18, 46 L. Ed. 413, and in Galbraith vs. Vallely, 256 U. S. 46, 65 L. Ed. 823.

In Stellwagen vs. Clum, decided by this court in 1918, the decision of Mayer vs. Hellman was expressly held to be correct under the present bankruptcy law, and the court quoted with approval Mr. Justice Field's language holding that the statute of Ohio regulating assignments for the benefit of creditors was "not an insolvent law in any proper sense of the term." Mayer vs. Hellman has

been cited so often by this court that it would be surplusage to quote from it here.

The rule of Mayer vs. Hellman has been adopted, cited, and followed in literally dozens of cases. To cite only a few, for the purpose of showing the ubiquity of its adoption: In Re Farrell, (C. C. A., 6th Circuit, 1910) 176 Fed. 505; In Re Creech Bros. Lumber Co., (C. C. A., 9th Circuit, 1917) 240 Fed. 8; Patty-Joiner & Eubank Co. vs. Cummins, (Texas Sup. Ct., 1900) 59 S. W. 297; Duryea vs. Guthrie, (Wis. 1903), 117 Wis. 399, 94 N. W. 365; Re Tarnowski, (Wis.) 191 Wis. 279, 210 N. W. 836; Akers vs. Rowan, (So. Car.), 10 L. R. A. 705; Bertenshaw vs. Klag (Kans. 1924), 231 Pac. 73; and innumerable decissions of federal district courts.

Appellants stress the fact that in Mayer vs. Hellman more than four months had elapsed after making the assignment, before filing the petition in bankruptcy; but, if their contention is correct and an assignment is absolutely void, four *years* would make no difference, because if it were void, mere passage of time could not breathe life into it. Many times four months have passed in the instant case since the making of the assignment, and no bankruptcy has intervened. If a petition in bankruptcy were now filed in the instant case, the assignment would be a closed proceeding, because title has long since passed, and cannot be attacked. So this court held

in Mayer vs. Hellman. But appellants contend that title did not pass, which raises a conflict between this court and the appellants' theory of the case.

Appellants make much in their brief about affording the insolvent debtor a choice of remedies. If the debtor sought discharge, there is no choice—the only recourse is to the bankruptcy law. The debtor here may take his choice of distributing his property as far as it will go and leaving the unpaid balance as a future liability, under an assignment, or he may go into the bankruptcy court, and procure a discharge. But there is nothing in the law or the decisions which would *compel* a man to take bankruptcy, except by action of the creditors, or which make it his duty to file a voluntary petition. Appellants contend, at page 48 of their brief, that one who has the privilege of becoming a bankrupt under the Bankruptcy Act, cannot ignore the privileges of that law. However, the Circuit Court of Appeals for the Eighth Circuit disposed of this contention in 1903 in Summers vs. Abbott, 122 Fed. 36, in which it was specifically held that there was no obligation or duty upon an insolvent to voluntarily go into bankruptcy, but that he had a perfect legal right to make a deed of assignment to accomplish the "laudable purpose" of distributing his property ratably as far as it would go.

Appellants quote at some length from In Re Gutwillig,

90 Fed. 475, and 92 Fed. 357, but fail to quote the portion wherein Judge Brown says:

> "I do not think that a general assignment made in conformity with laws like those of the State of New York can be considered 'as a proceeding commenced under State Insolvency laws,' "

nor do they show that the point for decision was whether an assignment for the benefit of creditors was *voidable as against a trustee in bankruptcy* appointed under proceedings begun within four months. There has never been any doubt on the latter point, for thirty years.

It is unquestioned that an assignment for the benefit of creditors is an act of bankruptcy. So, too, is a state court receivership on the grounds of insolvency. So is a preferential transfer of property by an insolvent debtor. But none of the three acts above mentioned is innately wrong or illegal, and none of them is void *except* as against direct bankruptcy proceedings. Unless bankruptcy proceedings are begun within four months of the act, a preferential transfer cannot be set aside. Unless bankruptcy proceedings are begun within four months, an assignment for the benefit of creditors cannot be attacked. If the mere fact that an assignment for the benefit of creditors is made an act of bankruptcy would be sufficient, without the expression of any such specific intent, to make such an assignment void ab initio, the same reasoning would apply to the appoint-

ment of a state court receiver, which is a reductio ad absurdum, for hundreds of state court receivers are appointed every year, and no one has ever thought for an instant that such proceedings were void, being merely voidable by a trustee in bankruptcy within four months.

Appellants further contend that this court, by its dicta in the Pinkus case upon a radically different fact situation, has overruled the reasoning of the Supreme Court of Texas, as expressed in Keating vs. Vaughn, 61 Texas 518:

> "The statute in question is in no sense an insolvent law providing for the discharge of a debtor by a compliance with its terms without the consent of the creditor, but is a statute which, for the better protection of creditors, prescribes a mode for the administration of the estates of insolvents under assignments made by the debtors themselves which would be good at common law unaided by the statute, and, like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration.
>
> "Proceedings under such statutes have been sustained and held not to be even suspended by a general bankrupt law enacted by Congress."

Not only has this court not ever specifically overruled the above holding of Keating vs. Vaughn, but this court has often laid it down as a rule for its action that it

would not do so. In Union National Bank of Chicago vs. Bank of Kansas City, 136 U. S. 223, 34 L. Ed. 341, this court said:

> "The question of the construction and effect of a statute of a state, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest courts of the state, establishing a rule of property, are of controlling authority in the courts of the United States. Brashear vs. West, 7 Peters 608, 8 L. Ed. 801; Allen vs. Massey, 84 U. S. 351, 21 L. Ed. 542; Lloyd vs. Fulton, 91 U. S. 479, 23 L. Ed. 363; Summer vs. Hicks, 67 U. S. 532, 17 L. Ed. 355; Jaffray vs. McGehee, 107 U. S. 361, 27 L. Ed. 495; Peters vs. Bain, 133 U. S. 670, 33 L. Ed. 696; Jencks vs. Quidnick Co., 135 U. S. 457, 34 L. Ed. 200."

This rule was recognized by this court in the Pinkus case, as hereinbefore cited, where this court said:

> "The Arkansas Statute is an insolvent law. It is so designated in its title, Arkansas Acts of 1897, and in the revision. The Supreme Court of the State treats it as such."

This rule has been applied by the lower federal courts in Re Curtis, 91 Fed. 737, applying the Illinois law; In Re Bridge, 230 Fed. 184, applying the Washington law; Galbraith vs. Kline, 7 Fed. (2nd) 682, applying the Montana law. In the last case, the court, after citing Union National Bank vs. Bank of Kansas City, supra, said,

> "The validity of an assignment for the benefit of creditors is to be determined by the statute law in force at that time in the state in which it is made, or in its absence by the common law."

The language above quoted from Keating vs. Vaughn has often been cited with approval and followed by the Supreme Court of Texas, and the Courts of Civil Appeals, showing that the history of the Texas law is not one of an insolvent law, as claimed by appellants, but rather of a law regulating administration of assignments for the benefit of creditors. The Texas Supreme Court held in 1900, in Patty-Joiner & Eubank Company vs. Cummins, 59 S. W. 297, after quoting the foregoing language from Keating vs. Vaughn, and in passing upon the specific question involved in the instant case, that:

> "We conclude that the law of this State, concerning assignments for creditors, is not an insolvency law."

The language in Keating vs. Vaughn is again approved by the Supreme Court of Texas in Hajek & Simicek vs. Luck, 74 S. W. 305. And just here it may be pointed out that appellants cite the Hajek case as an instance of conflict in the Texas law, not pausing to call this honorable court's attention to the fact that the *assignment itself*, in that case, provided for a release by accepting creditors, and the complainants therein gave a release as a condition of receiving their portion of the proceeds,

quite unlike the assignment in the instant case, or in the Patty-Joiner case.

The most recent approbation of the foregoing language is found in the opinion of the Court of Civil Appeals in the instant case, approved and affirmed by the Supreme Court.

Accordingly, under the rule of the Union National Bank case, supra, the Texas law of assignments for the benefit of creditors should be held to be just that, and not in any sense an insolvency law.

Such being the case, the instant matter falls under the rule of Mayer vs. Hellman and Stellwagen vs. Clum, and completely outside the rule of International Shoe Company vs. Pinkus. The distinction between the two lines of decision was ably pointed out by Judge Adams, district judge, In Re Sievers, 91 Fed. 366:

> "Concerning these different contentions, it appears to me that there is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent as a proceeding in the court, derives its potency from the law, winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy, and such is undoubtedly superseded by the Act of Congress in question . . . The other derives its potency not from the law, but

> from the contract or deed of the debtor, is administered under and according to the provisions of the deed, supplemented only by salutary legislative safeguards, and does not result in a discharge of the debtor from his obligations. This method of proceeding is not superseded by the Act of Congress in question. Mayer vs. Hellman, 91 U. S. 496; Boese vs. King, 108 U. S. 379; Reed vs. McIntyre, 98 U. S. 507."

The Sievers case has often been cited with approval by this court, and the distinction as set out therein has been carefully observed thruout every jurisdiction in the country. Mr. Justice Butler obviously had this distinction in mind in International Shoe Company vs. Pinkus when he opened his opinion in that case by first pointing out that the statute under discussion was an insolvency law, and continued by saying:

> "In the opinion of the State Supreme Court it is said that the effect of the proceeding in the chancery court was the same as if the insolvent had made an assignment for the benefit of his creditors. But the property was not handed over simply for the purpose of payment of debts as far as it would go; it was transferred pursuant to a statute and decree imposed intending to secure the debtor's discharge,"

expressly refusing to give the Arkansas Insolvency Law the effect of an assignment for the benefit of creditors.

The opinion closes with the statement that, as all the proceedings were under the Arkansas Insolvency Law, there is no need to decide whether an assignment, on the conditions specified in the decree, independently of statute, would protect the property from seizure by the creditor.

Only a very loose perusal of the opinion in the Pinkus case could lead one to believe that it was ever intended to apply to such a state of facts as here exist. In the instant case the appellants are in the anomalous position of seeking to avail themselves of the Bankruptcy Law in order to defeat one of its primary purposes. If the appellants prevail, and utilize the Bankruptcy Law to overthrow the assignment herein, then appellants will collect the amount of their debt in full, while other creditors will receive about four per centum or less of theirs, and this in the face of the avowed purpose of the Bankruptcy Act to secure an equal and non-preferential distribution of the debtor's assets to all of his creditors!

However, appellants' view of the purposes of the Bankruptcy Act does not agree with that of this court, for in their conclusion (Appellants' Brief, pp. 41-2), the statement is made that the element of discharge is of minor consequence, and that distribution of the estate was originally the only purpose. This conflicts directly with the decision of this court, expressed in Burlingham

vs. Crouse, 228 U. S. 459, 57 L. Ed. 920; Williams vs. U. S. Fidelity Company, 236 U. S. 549, 59 L. Ed. 713; Kreitlein vs. Ferger, 238 U. S. 21, 59 L. Ed. 713; and Central Trust Company vs. Chicago Auditorium Association, 240 U. S. 581; in all of which this court held the discharge to be part of the two-fold purpose of the Bankruptcy Act.

(2) Regardless of the validity of Title 12 of the 1925 Revised Civil Statutes of Texas, the assignment in the instant case is valid and sufficient to pass title from the assignor to the assignee, and is not void.

It has been the contention of appellee thruout, and still is, that even if the Texas law regulating assignments for the benefit of creditors should be held suspended, yet nevertheless the power to make assignments was not created by the statute, but existed as a common law right long prior to enactment of the statute, which only regulated the administration of the estate after the assignment had been made, and that accordingly the assignment herein is valid, regardless of the validity of the statute.

This view, announced by the Texas Supreme Court in Keating vs. Vaughn, 61 Texas 518:

> "This is a statute which, for the better protection of creditors, prescribes a mode for the administration of the estates of insolvents under assign-

> ments made by the debtors themselves which would be good at common law unaided by statute and, like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration:"

and further elaborated by the same court two years later in 1886 in Weider vs. Maddox, 1 S. W. 168:

> "The right to make such assignments, if made bona fide, is not derived from statutes, but existed at common law, and now, in most of the States of this Union, laws have been enacted to regulate, control, and secure the faithful execution of the trust by the named assignee. The assignee acquires title and authority thru the assignor, whose act is in the nature of a contract, and the acceptance of it by the assignee imposes upon him a relationship of trust and confidence as to creditors and the assignor . . . That the assignment was made in the State of Missouri is a matter of no importance, as its validity does not depend upon any local law of that State, but is based on the common law right of an insolvent debtor to make an assignment of all his property subject to the payment of his debts for the benefit of his creditors;"

is the overwhelming weight of authority in America, as stated in 2 Ruling Case Law 644:

> "The right of a debtor to make an assignment for the benefit of creditors exists at common law as a corollary to the legal axiom that the power to dis-

> pose of property as one may see fit, where unrestricted by statute, is a necessary incident to the ownership of property;"

and was first enunciated by this court by Mr. Chief Justice Marshall in Brashear vs. West, supra, in the language before quoted:

> "The right to make it (an assignment for the benefit of creditors) results from that absolute ownership which every man claims over that which is his own."

and has been sustained by this court also in the cases of Boese vs. King, 108 U. S. 379, 27 L. Ed. 760, and Mayer vs. Hellman, supra, as well as in numerous cases in the federal courts and the State courts. In Re Farrell, 176 Fed. 505; In Re Sievers, 91 Fed. 366; In Re Bridge, 230 Fed. 184; In Re Tarnowski, 191 Wis. 279, 210 N. W. 836; Sabin vs. Chrisman, 154 Pac. 908; Cook vs. Rogers, 31 Mich. 391; Galbraith vs. Kline, 7 Fed. (2nd) 682.

Such being the case, and the assignment being sufficient to pass title regardless of the validity of the statutes, this court has held on numerous occasions that the assignment is valid until directly attacked in bankruptcy proceedings timely begun. This court said just that in Boese vs. King, 108 U. S. 379, 27 L. Ed. 760:

> "We are of the opinion that, except as against proceedings instituted under the Bankrupt Act for

> the purpose of securing the administration of the property in the bankruptcy court, the assignment, having been made without intent to hinder, delay or defraud creditors, was valid, for at least the purpose of securing an equal distribution of the estate among all the creditors of Locke in proportion to their several demands."

This same view was taken by this court in Mayer vs. Hellman, supra, and Reed vs. McIntyre, 98 U. S. 507, 25 L. Ed. 171, and also in Randolph vs. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, wherein Mr. Justice Holmes said:

> "The assignment was not illegal. It was permitted by the law of the State and cannot be taken to have been prohibited by the Bankruptcy Law absolutely in every event, whether proceedings were instituted or not. Re Sievers, 91 Fed. 366; Re Romanow, 92 Fed. 510. It had no general fraudulent intent. *It was voidable only in case bankruptcy proceedings should be begun.* At the time when it was made the institution of such proceedings was uncertain."

In 1917 the Circuit Court of Appeals for the Ninth Circuit, speaking in Re Creech Bros. Lumber Co., 240 Fed. 8, after citing Mayer vs. Hellman and Randolph vs. Scruggs as controlling, concluded:

> "It follows that an assignment for the benefit of creditors by an individual or by a corporation, without a fraudulent intent, is valid even where the as-

signment is set aside by bankruptcy proceedings commenced within the statutory period of four months from the date of the assignment; and where the assignment has been made more than four months before the commencement of bankruptcy proceedings the assignment is a closed proceeding."

This same rule has been followed by the federal courts in Summers vs. Abbott, 122 Fed. 36; In Re Chase, 124 Fed. 753; In Re Fish Bros. Wagon Co., 164 Fed. 553; In Re Shinn, 185 Fed. 990; Bell vs. Blessing 225 Fed. 750; Galbraith vs. Kline, 7 Fed. (2nd) 682; and numerous other cases.

As no bankruptcy proceedings have ever been instituted in the instant case, it is clear from the foregoing decisions that the assignment herein should be upheld as valid, regardless of the validity of the statutes of Texas regulating assignments.

The question of whether or not funds in the hands of an assignee for the benefit of creditors are protected from extraordinary process by any disgruntled creditor is purely a local question, not involving a federal statute at all. Once the validity or invalidity of the assignment itself is determined by this court, the Texas law on the effect of the assignment in removing funds from seizure by a disgruntled creditor would apply. It is conceded that if this court should hold that the assignment herein is not sufficient to pass title under its terms

to the appellee, then appellants would be entitled to recover, but it is equally clear that if the sufficiency of the assignment herein to pass title is upheld by this court, in line with its prior decisions, then it is beyond question that the Texas courts hold unanimously that appellants cannot seize funds held by an assignee upon a claim against the assignor. Piggott vs. Schram & Co., 64 Texas 447; Schoolherr vs. Hutchins, 1 S. W. 266; McKee vs. Coffin, 1 S. W. 276; Fant vs. Elsbury, 2 S. W. 866. These cases were reviewed by the Texas courts in the instant case, and, not involving a federal question in any way, control the case, once this court has passed on the federal question of conflict between the assignment, and the Texas laws, with the United States Constitution and the Bankruptcy Act.

CONCLUSION

In conclusion, then, it has been shown that no question of discharge is properly in this case; that the property conveyed under the assignment herein was for the equal benefit of all creditors, whether accepting or not, and no release was sought; that appellants seek to recover the full amount of their claim to the detriment of all other creditors, contrary to the very moving spirit and guiding principle of the bankruptcy act; that the Texas law assailed by appellants is a regulatory measure concerning administration under assignments for the benefit of creditors, similar to laws of other states often

upheld in this court; that the Texas law is in no sense an insolvency law, by decision of the highest courts in Texas, which this court has heretofore announced to be binding upon it; that irrespective of statute, the assignment herein is sufficient, as at common law, to pass title to the appellee assignee; that such assignment has been often held to be valid except as against direct proceedings in bankruptcy seasonably taken, which are completely lacking here; and that pursuant to the Texas rule in such cases, the funds in the hands of the assignee are immune from the claim of appellants.

Accordingly, the appellee herein respectfully submits that the Texas Supreme Court and the Court of Civil Appeals committed no error herein, being guided solely by the prior pronouncements of this honorable court, and appellee therefore respectfully prays this court to affirm the judgment of the Supreme Court of the State of Texas.

Respectfully submitted,

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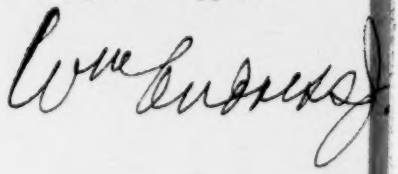

SUPREME COURT OF THE UNITED STATES.

No. 282.—October Term, 1932.

Helen C. Johnson, Herbert F. Johnson, Jr., Henrietta J. Louis, et al., etc., Appellants, *vs.* Arthur Star.	Appeal from the Supreme Court of the State of Texas.

[January 9, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

Prior to March 13, 1931, appellants obtained a judgment for $113.20 against the Dallas Showcase & Manufacturing Company. On that day the latter, being insolvent and having unsecured indebtedness of about $11,000, made to appellee a voluntary assignment of all its property for the benefit of its creditors. Appellants refused to accept under the assignment and brought garnishment proceedings in justice court against the appellee. He answered that as such assignee, acting under Title 12 of the Texas Revised Civil Statutes, 1925, he had converted the assigned property into cash and had $582.63 which, as he insisted, was not subject to garnishment. The justice of the peace held him liable. He appealed to the county court and there the case was submitted on an agreed statement showing the facts aforesaid. The court held the state law in conflict with the Bankruptcy Act and that therefore the amount on hand was subject to garnishment. The court of civil appeals reversed, 44 S. W. (2d) 429, and the supreme court approving its opinion denied writ of error. — Tex. —.

The sole question is whether as construed by its highest court, articles 261-274 of Title 12 are repugnant to the Bankruptcy Act.

These provisions are derived from an Act of March 24, 1879, (Acts 1879, p. 57) as amended, Acts 1883, p. 46. Evidently, that statute was intended to take the place of the Bankruptcy Act of 1867, which was repealed in 1878. *Cunningham* v. *Norton,* 125 U. S. 77, 81. It established a complete system for the adminis-

tration of property conveyed by insolvent debtors for the benefit of their creditors. *Tracy* v. *Tuffly*, 134 U. S 206, 223. Every such assignment is required to provide for ratable distribution of the insolvent's estate among the consenting creditors and, whether or not so specified, is deemed sufficient to pass all the assignor's property to the assignee. Art. 261. "A debtor may make such assignment and shall thereupon stand discharged from all further liability to such consenting creditors. . . . Such debtor shall not be discharged from liability to such creditor who does not receive as much as one-third of the amount . . . allowed in his favor. . . ." Art. 263. Non-assenting creditors take nothing under the assignment, art. 265, but may garnishee any excess remaining after full payment of consenting creditors and the expenses of executing the assignment. Art. 271.

"The statute in question is in no sense an insolvent law, providing for the discharge of a debtor by a compliance with its terms without the consent of the creditor; but is a statute which, for the better protection of creditors, prescribes a mode for the administration of the estates of insolvents under assignments made by the debtors themselves, which would be good at common law, unaided by the statute, and, like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration." *Keating* v. *Vaughn*, (1884) 61 Tex. 518, 524. And see *Leon & H. Blum* v. *Welborne* (1882), 58 Tex. 157, 161. *McKee* v. *Coffin* (1886), 66 Tex. 304, 309. *Fant* v. *Elsbury* (1887), 68 Tex. 1, 5. And in a case arising after the passage of the present Bankruptcy Act a lower court propounded the question whether this law was suspended by the Bankruptcy Act. The supreme court, after reference to *Boese* v. *King*, 108 U. S. 379, said: "The effect of the ruling [in that case] is that, in so far at least as an insolvent law of a State provides for a release by the creditors, it is suspended by a bankrupt law of the United States, but that if the assignment convey all the debtor's property subject to the payment of his debts for the equal benefit of all his creditors who may accept under it, it is otherwise valid, except as against proceedings seasonably taken under the bankrupt act." *Patty-Joiner & Eubank Co.* v. *Cummins* (1900), 93 Tex. 598, 604. And in a later case the court held that though the statute in so far as it makes provision for exacting releases should be held

to be an insolvent law, and therefore suspended by the Bankruptcy Act, one who had accepted and received one-third of the amount of his claim under an assignment good at common law, though exacting such release, where no proceedings were had under the Bankruptcy Act, thereby discharged the debtor from liability. *Haijek & Simecek* v. *Luck* (1903), 96 Tex. 517.

In the case at bar the court of civil appeals for the fifth district observed the differences between state insolvency laws and those merely regulating voluntary assignments for the benefit of creditors and, following the rule established by the Texas supreme court that non-consenting creditors may not seize property covered by such assignments, held that the fund in the hands of the assignee was not garnishable. And the supreme court, approving that decision and disapproving one to the contrary announced by the court of civil appeals for the sixth district, *Johnson* v. *Chapman Milling Co.*, 37 S. W. (2d) 776, held that "the questions at issue have been definitely settled by this court in the cases of" *Patty-Joiner & Eubank Co.* v. *Cummins, supra,* and *Haijek & Simecek* v. *Luck, supra.*

Accepting as we do that court's construction of the provisions in question, we are of opinion that they are not repugnant to the Bankruptcy Act. This case is ruled by our decision in *Pobreslo* v. *Joseph M. Boyd Company,* — U. S. —.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.